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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 888.

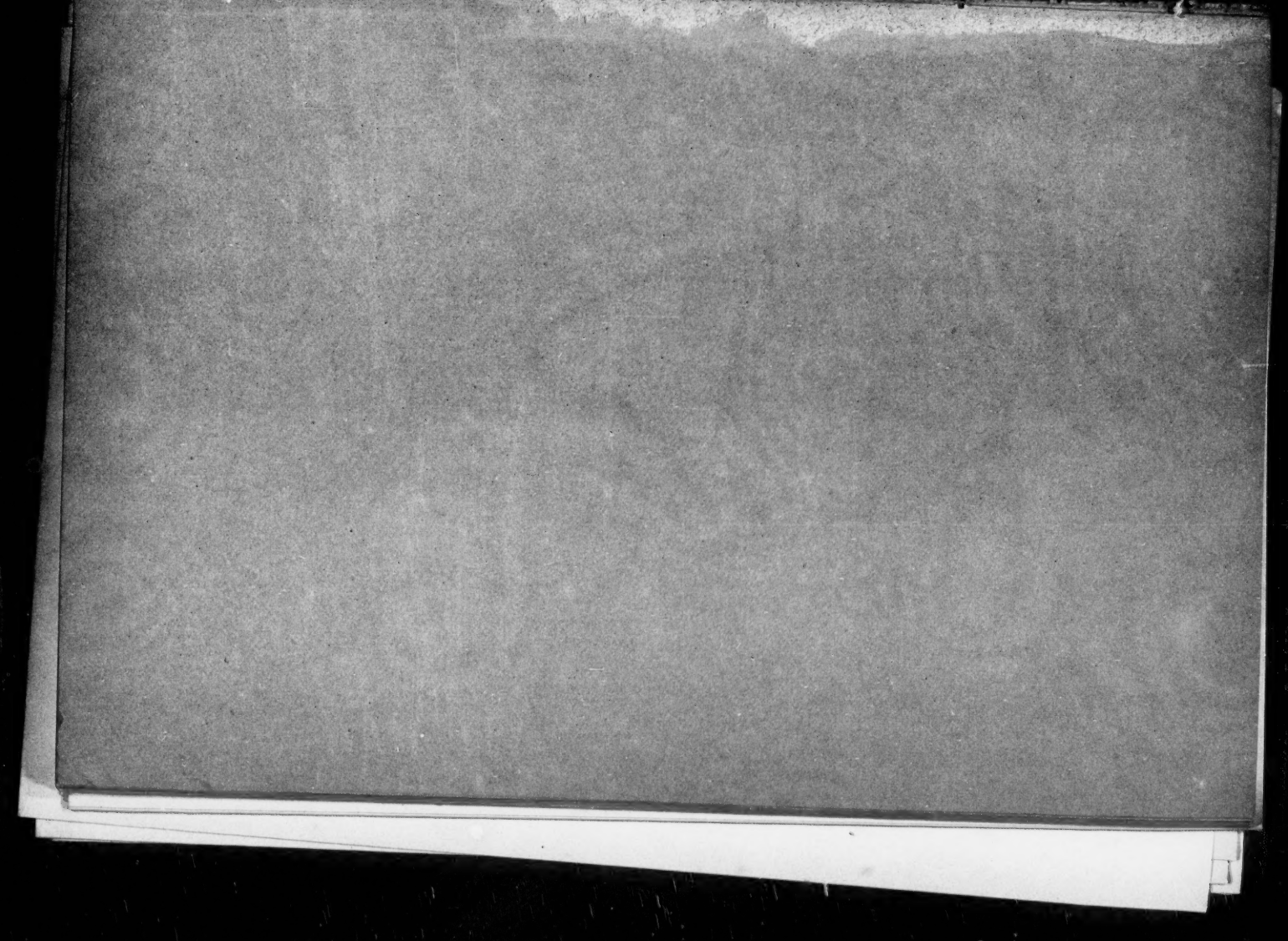
CHARLES E. SHELTON AND ROXANNA SHELTON, APPELLANTS,

vs.

EDGAR M. VAN KLEECK, ANDREW S. MILLAN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JULY 31, 1882.



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1 Pleas in the circuit court of the United States within and for the northern district of Illinois, begun and held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the honorable Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Saturday, the seventeenth day of December, in October adjourned term of said court, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and sixth year.

WILLIAM H. BRADLEY, *Clerk.*

CHARLES E. SHELTON AND ROXANA SHELTON *vs.* EDGAR M. VAN KLEECK, ANDREW S. McMILLAN, THOMAS H. THOMPSON, GEORGE BENNETT, JOHN ANDRIM, GERHARD FOREMAN, ELIAS GREENEBAUM, ELIZABETH BLUE, JAMES E. MORROW, MARTHA SECOR, A. F. FISHER, WM. M. McGREGOR, PETER TERWILLIGER, AND MOSES ROSE.	17567. In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on twenty-second day of August, A. D.
2 1881, came Charles E. Shelton and Roxana Shelton, complainants, by Charles J. Beattie, esq., their solicitors, and by leave of court filed in the office of the clerk of said court their bill of review in said entitled cause, which said bill of review is in the words and figures following, to wit:

Bill of review.

To the honorable the judges of the circuit court of the United States for the northern district of Illinois:

Humbly complaining your petitioners, Charles E. Shelton and Roxana Shelton, show unto your honors that on or about the 10th day of November, A. D. 1877, Edgar M. Van Kleeck, a citizen of the State of New York, exhibited his bill of complaint in this honorable court against your petitioners and Gerhard Foreman, Elias Greenebaum, James E. Morrow, Martha Secor, A. F. Fisher, William M. McGregor, Julius Rosenberger, Moses Rose, Andrew S. McMillan, and Peter Terwilliger, in which bill of complaint it is alleged that all of the defendants named in said
3 bill are citizens of the State of Illinois, which bill of complaint is in the words and figures following, to wit:

"UNITED STATES OF AMERICA,
"*Northern District of Illinois:*

"December terms, A. D. 1877.

"To the honorable the judges of said court, in chancery sitting:

"Humbly complaining showeth unto your honors, your orator, Edgar M. Van Kleeck, that he is a resident of the city of Poukeepsie, and State of

New York; that the defendants hereinafter named are all residents of the State of Illinois, and that the amount involved in this suit exceeds the sum of five hundred dollars; your orator shows unto your honors that on the 21st day of September, A. D. 1871, one Charles E. Shelton executed his certain principal promissory note, payable to his own order, for the sum of nine thousand dollars ($9,000) and due in five years after its date, with interest at the rate of ten per cent. per annum after due, payable semi-annually, and that on the same day he also made his ten interest notes for the sum of four hundred and fifty ($450) dollars, each payable to his own order and due respectively in 6, 12, 18, 24, 30, 36, 42, 48, 54, and 60 months after date respectively, with interest on each note at the rate of ten per cent. per annum after due, and that said Shelton
4 then and there, in consideration of a loan of nine thousand dollars made by your orator to said Shelton, indorsed and delivered said notes to your orator. Your orator further states that afterwards, on the said 21st of September, A. D. 1871, the said Charles E. and Roxanna Shelton, his wife, made and executed a certain deed of trust to secure the payment of said notes; that in said deed of trust Gerhard Foreman was constituted and named as trustee, and Elias Greenebaum named and made successor in trust therein, which said deed of trust described and conveyed the following described real estate, to wit; the west half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section one (1), the southeast $\frac{1}{4}$ of section two (2), the southwest quarter, the east half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$), and the undivided half of the west half of the southeast quarter of section ten (10), the north half of the southwest quarter ($\frac{1}{4}$) of section eleven (11), and that part of the northwest quarter ($\frac{1}{4}$) of section fifteen (15) which lies northwest of Rook's Creek, all in township twenty-eight (28) north, range four (4) east of the 3rd p. m., in the county of Livingston, in the State of Illinois, and in said district, containing seven hundred
5 and fifty acres, more or less; which said deed of trust was duly recorded in the recorder's office of said Livingston County, on the 27th day of September, A. D. 1871, in book K of mortgages, on pages 488, 489, 490, 491, and 492 of the record thereof.

" Your orator further states to your honors that said deed of trust, among other things, provided that in order to create a first lien on said property, the said Charles E. and Roxana Shelton thereby release and waive all right under and benefit of the exemption and homestead laws of the State of Illinois, and in the lands and premises and the proceeds of any sale thereof, and therein agree to surrender up possession thereof to the purchaser or purchasers thereof under said deed of trust; said deed of trust, among other things provides, that in case of any suit or proceedings at law or in equity wherein said trustee shall be a party by reason of his trusteeship under said deed, he shall be allowed and paid his reasonable costs, charges, attorneys and solicitors' fees in such suit or proceedings by said party of the first part, and that the same should be a further charge and lien upon said premises contained in said deed of trust.

"Said deed of trust also, among other things, provides that in case
6 of default in payment of said principal note, or any part thereof, or any interest thereon, according to the tenor and effect of said note, then on application of the legal holder of said note and in giving the notice provided in said deed of trust in the manner therein provided the said trustee should proceed and sell and convey said real estate.

"Your orator states to your honors that said principal note became due and payable, and your orator by his agent being then the legal holder thereof, as well as of several of said interest notes, required the said Gerhard Foreman, the said trustee, to proceed and sell under the provisions of said trust deed; that said trustee accordingly advertised said property for sale, but that on about the day appointed for said sale the said Foreman was notified that a decree had been entered in the circuit court of said Livingston County, against him, the said Foreman, enjoining him, the said Foreman, from making said sale, and thereupon the said Foreman refused and has since continued to refuse to further act as trustee under said deed of trust and make said sale.

"Your orator claims and alleges that he has expended and incurred liability for a large amount of solicitor's fees in and about the filing of
7 this bill and preparation therefor that he is entitled to have added to the amount due on such deed of trust said solicitor's fees, including those for all services to the conclusion of this suit under, the terms of said deed of trust, and that the sum of five hundred dollars is a reasonable amount therefor, and that he is also entitled to have added to the amount due on said deed of trust the amount of the expenses *the amount of the expenses* of said trustee in and about the said attempted sale under said deed of trust.

"Your orator states that there are divers judgments against the said Charles E. Shelton in the circuit court of said Livingston County, and that James E. Morrow, Martha Secor, A. F. Fisher, Wm. M. McGregor, Peter Terwilliger, Julius Rosenberger, and Moses Rose claim to have some interest in said real estate, as judgment creditors or otherwise, but your orator alleges that their interests, if any they have, are inferior to the interests of your orator.

"Your orator states to your honors that Benjamin H. Blue, the husband of Elizabeth Blue, who is now deceased, and Charles E. Shelton, on the 10th day of December, A. D. 1866, had loaned from your orator, through his agent, Greenebaum & Foreman, the sum of four thousand dollars ($4,000), and secured the same by trust deed upon a portion of said real estate then owned by the said Blue, contained in the said first men-
8 tioned trust deed then belonging to said Benjamin H. Blue; that again, on the 21st day of June, A. D. 1869, the said Blue and Shelton loaned of your orator a further sum of four thousand dollars ($4,000), and secured the same by trust deed upon a portion of said real estate then owned by the said Blue, contained in the deed of trust being foreclosed in this suit, running to Elias Greenebaum as trustee, and that at another time the further sum of ($3,000) three thousand dollars had been loaned of your orator and secured upon said real estate.

"Your orator states that on the sixth day of January, A. D. 1871, the said Benjamin H. Blue and Elizabeth, his wife, conveyed by warranty deed with full covenants a portion of the property contained in said first mentioned deed of trust, to wit, the northeast quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) and the northwest quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section 11. Also, the south half ($\frac{1}{2}$) of section 10, and that part of the northwest quarter ($\frac{1}{4}$) of section 15 which lies northwest of Rook's Creek, all in township 28 north, range 4 east of the 3rd principal meridian, subject to said trust deed for $4,000, last executed for the benefit of your ora-

tor as aforesaid, which said deed from the said Blue and wife to the said Shelton was duly recorded January 21st, 1871, in the recorder's office of said Livingston County.

9 "Your orator states that when said Charles E. Shelton applied to your orator for the loan secured by the trust deed being foreclosed in this suit he presented an abstract of title to the real estate therein contained, showing, among other things, the said warranty deed from said Blue and wife to said real estate, and the clause assuming said four thousand (4,000) dollar trust deed then due from your orator, and represented that he was the owner of said lands. Your orator further states that the said former loan of $4,000, and unpaid interest, secured as aforesaid upon the said land so conveyed by said Blue and wife, evidenced by the names of said Blue and Shelton to said notes, and of them and their wives to said trust deed, that the amount then due upon said $4,000 trust deed was paid out of the said $9,000 loan, and the residue paid to said Shelton in cash. Your orator further states to your honors that it is sometimes claimed that a decree was entered in the circuit court of Livingston County, said State, on or about the 7th day of July, 1877, in a certain cause then depending, in which Elizabeth Blue was complainant and Charles E. Shelton and others were defendants, by which the rights of your orator, under his said deed of trust, are in some manner impaired; but your orator states that

10 although your orator has always been the holder and owner of the notes secured by the said $9,000 trust deed, he was not made a party to said suit, and is in no manner bound thereby; that his trustee, Foreman, was never served with process therein or notified as to said suit until after said alleged decree had been entered, and that his appearance was entered, if at all, entirely without his authority or knowledge, and that the said proceeding is utterly void as to your orator.

"Your orator states that said Andrew S. McMillan claims some interest in a portion of said land, but that whatever interest he may have is subordinate to the said deed of trust of your orator.

"Your orator states that there is due to your orator and unpaid the said principal note of $9,000, two of said interest notes of $450 each, the interest subsequently accruing upon said principal and interest notes, and the costs, expenses, and liabilities aforesaid, for which your orator is entitled to a foreclosure of his said deed of trust.

"Your orator therefore prays that the said Charles E. Shelton, Roxana Shelton, Gerhard Foreman, Elias Greenebaum, Elizabeth Blue (Benjamin H. Blue having deceased), James E. Morrow, Martha Secor, A. E. Fisher, William M. McGregor, Peter Terwilliger, Julius Rosenberger, Moses Rose, and Andrew S. McMillan be made defendants, and notified that they severally be required to full, true, and perfect answer make to all

11 and singular the matters aforesaid, but not under oath, the oaths of said defendants being severally hereby waived, and that on final hearing hereof your honors will order, adjudge, and decree payment of the amount due your orator, and in default of payment within a short day that the said real estate, or so much thereof as shall be found subject to the lien of the said deed of trust, and as is necessary to make the amount due your orator, be sold, in accordance with the rules of chancery, and such further and other relief as to your honors shall seem meet, and as the

nature and justice of the case may seem to require. And your orator will ever pray, &c.

"EDGAR M. VAN KLEECK,
"By JOHN I. BENNETT,
"*His Solicitor.*"

Your petitioners further aver that your petitioners having been made co-defendants in said above-mentioned bill, duly and fully made answer to said bill, and filed and exhibited the same in this court on the 6th day of December, A. D. 1881, which answer is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for said district.

E. M. VAN KLEEK
vs.
CHARLES E. SHELTON ET AL. } Bill to foreclose.

12 The joint and several answers of Charles E. Shelton and Roxana Shelton to the bill of complaint of the said complainant.

These defendants now, and at all times hereafter, saving and reserving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, imperfections, uncertainties, and misstatements in said bill contained for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer unto, answering, say:

That these defendants admit that said Charles E. Shelton did, on the 21st day of September, A. D. 1871, execute his principal promissory note, payable to his own order, for the sum of $9,000, and due in five years after its date, with interest at the rate of ten per cent. per annum after due, payable semi-annually, and that on the same day he also made his certain ten interest notes, for the sum of $450 each, payable to his own order, and due respectively in 6, 12, 18, 24, 30, 36, 42, 48, 54, and 60 months after their dates, respectively, with interest on each note at the rate of 10 per centum per annum after due, and that he indorsed and delivered said notes to the plain , agent, Elias Greenebaum, one of the defendants named in said bill of complaint.

13 These defendants, further answering, say that they admit that on the 21st day of September, A. D. 1871, these defendants executed and acknowledged a certain deed of trust to secure the payment of said notes; that in the said deed of trust Gerhard Foreman was constituted and named as trustee and Elias Greenebaum was made successor in trust; and that the real estate mention' and described in complainant's said bill of complaint is the same and identical real estate conveyed in said deed of trust, to wit, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 1, the SE. $\frac{1}{4}$ of section 2, the SW. $\frac{1}{4}$, the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and the undivided half of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 10, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 11, and that part of the NW. $\frac{1}{4}$ of section 15 which lies northwest of Rook's Creek,

all in town. 28 north, range 4, east of the 3rd p. m., in Livingston County, in this State and in this district, containing 750 acres, more or less; and these defendants further admit that said deed of trust was duly recorded in the *recorded in the* recorder's office of said Livingston County on the 27th day of September, A. D. 1871, in book R of mortgages, on pages 488, 489, 490, 491, and 492 of the records thereof, as alleged in said bill of complaint.

"These defendants, further answering, say that as to the allegations in said bill contained in relation to the provisions of said deed of trust as to the notice, advertisement, time and place of sale, or as to the
14 costs of foreclosure, charges and expenses of suit, and as to the allowance of attorneys and solicitors' fees, and as to whether or not it is provided therein that the same should become a lien on said premises, these defendants do not know and have not been informed, except by said bill of complaint, and therefore neither admit or deny the same.

"These defendants, further answering, say that as to the allegations in said bill contained that these defendants waived their rights of homestead in said premises, and that they agreed to surrender the possession thereof, that said allegations, in manner and form as the same are in said bill contained, are not true, and these defendants deny the same.

"These defendants, further answering, say that whether or not said trustee, Gerhard Foreman, refused to sell said premises, or whether or not there are judgments existing against said Charles E. Shelton, these defendants do not know and have not been informed, except by said bill of complaint, and therefore neither admit or deny the same; but these defendants admit that they conveyed a portion of said premises, as mentioned in said bill of complaint, to said Elizabeth Blue, subject, however, to the lien of said deed of trust.

"These defendants, further answering, say that they admit that said Elizabeth Blue and her husband, Benjamin H. Blue (then living,
15 but since deceased), and the said Charles E. Shelton, executed a deed of trust for $4,000 on the 10th day of December, A. D. 1866, and that Benjamin H. Blue and wife executed their deed of trust to Elias Greenebaum, as trustee, on the 7th day of November, A. D. 1863, for the sum of $3,000, and that the same were duly secured on the lands then owned by said Benjamin H. Blue, as described and mentioned in said bill of complaint, and these defendants aver that the amount mentioned and described in said $4,000 deed of trust was only and solely the amount of the said $3,000 deed of trust, and the accrued interest thereon, and that the said $4,000 deed of trust was simply an extension of the said $3,000 deed of trust and interest, and these defendants aver that said two last mentioned deeds of trust were made and executed for the use and sole benefit of said Benjamin H. Blue; that the said sum of $3,000 was received by him, and that not one cent of said $3,000, or of the amount mentioned deeds of trusts was received by these defendants, or either of them, or to or for their use, or the use of either of them, and that said last-mentioned two deeds of trust were secured on the lands of said Benjamin H. Blue by said deeds, and should of right be a lien on the same, as alleged in said bill of complaint.

These defendants, further answering, say that they admit that
16 the said sum of $4,000 mentioned in said $4,000 deed of trust

was and is included in said deed of trust now sought to be foreclosed, and that said sum of $4,000 was not paid by said Blue and wife, or any one for them, and that said Elizabeth Blue ought in equity and good conscience, to pay the same, or that the same ought to be declared a lien on the lands conveyed to said Elizabeth Blue by these defendants as aforesaid.

"These defendants, further answering, say that it is not true, as alleged in said bill of complaint, that these defendants owe to the said complainant the sum of $9,000, and interest, as therein set forth; and these defendants aver that as to the said sum of $4,000 hereinbefore mentioned, that amount of said deed of trust is an indebtedness of the said Blues, and not of these defendants, and these defendants are not bound in equity or good conscience to pay the same, and that as to the balance of said $9,000 deed of trust and notes described therein, the same, except the sum of $3,378, is all usury and usurious interest, and these defendants beg leave to interpose the defense of usury to said bill of complaint in this their answer, and to insist on the statute of usury herein in the same manner and with like effect as if the same had been specially pleaded by plea herein. These defendants, further answering, say that on or about
17 the first day of September A. D. 1871, the said Charles E. Shelton applied to the said complainant, through his agent in Chicago, in this State, to borrow from said complainant the sum of $5,000, and said agent then stated to said Charles E. Shelton that if he, Shelton, would further secure the said Blue loan of $4,000, with other and additional real estate security, he would loan said Shelton $5,000; that said sum of $5,000 so to be loaned should be included with the amount of the Blue loan of $4,000 in one deed of trust, and that said Shelton should give his notes and deed of trust to secure the same, payable in five years from the date of said notes and deed of trust, and that as soon as said notes and deed of trust were properly executed, and said deed of trust duly acknowledged by these defendants, and forwarded to said agent at Chicago aforesaid, then said agent would pay to said Charles E. Shelton said sum of $5,000; and these defendants aver that said notes were duly executed and said deed of trust duly acknowledged as alleged in said bill of complaint, and the same forwarded and delivered to said complainant's said agent in Chicago as aforesaid; and these defendants aver that said complainant then held and kept said notes and deed of trust, and caused said deed of trust to be recorded, as alleged in said bill of complaint, and the complainant
18 and his said agent refused to pay said Shelton said sum of $5,000, and only paid to said Shelton the sum of $3,378, and the balance of said $5,000 the said complainant kept, held, and retained as usurious interest on said pretended loan of $5,000, and said complainant still holds and keeps said balance and has never paid the same to said Shelton, or to any one for his use.

"These defendants, further answering, say that said Charles E. Shelton has, since said last-mentioned loan was made, paid to the complainant the just and full sum of $4,050, which these defendants insist was and is full payment, discharge, and satisfaction of all claim or claims of the said complainant against these defendants, and that these defendants are not in conscience or equity bound to pay the said Blue loan of $4,000, or any part thereof.

"These defendants, further answering, say that the additional real-estate security given by said Charles E. Shelton to secure said notes was and is the farm and homestead of these defendants; that said Charles E. Shelton is the head of a family, and a householder, and is at present residing with his family on said farm in said homestead.

"These defendants, further answering, say that the said complainant charged and received as interest on said loan of $5,000 the sum of $1,622.00, and deducted that amount from said sum of $5,000, and kept
19 and retained the same as interest on said $5,000 loan, which interest was calculated and figured by him and his said agent at the rate of thirty-two and two-fifths per centum per annum on said loan for the first year, and defendants aver that said rate of interest was and is contrary to the statute, and usurious; and defendants interpose the bar of the statute herein against the recovery of any interest on said $5,000 loan, and on the said principal note, and on the said ten interest notes, and every of them.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said bill charged; without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct; and, having fully answered herein, they pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

"CHARLES E. SHELTON.
"ROXANA SHELTON.

"CHAS. J. BEATTIE,
"Solicitor."

20 Your petitioners further show unto your honor that said complainant replied to said answer and filed in this court a general replication thereto such as is usual in courts of chancery, and that said cause was duly referred to a master in chancery of this court to take and report the proofs and evidence herein to this court; that depositions were taken and evidence heard before said master, who reported the same to this court, and filed his report, together with the evidence and depositions taken by him in this court, on the 28th day of April, A. D. 1879, to which report, evidence, and depositions now on file in this court your petitioners refer for evidence and testimony herein and make the same a part of this bill of complaint; that your petitioners filed exceptions to the report of said master, which are now on file in said cause, to which reference is respectfully made, and said exceptions are hereby made a part of this bill of complaint; that said exceptions were overruled by the court and a decree entered in favor of complainant in words and figures following, to wit:

In the circuit court of the United States, for the northern district of Illinois. In chancery.

E. M. VAN KLEECK, COMPLAINANT
vs.
CHARLES E. SHELTON, ROXANNA SHELTON, Elizabeth Blue, Andrew S. McMillan, Gerhard Foreman, Elias Greenebaum, James E.
21 Morrow, Martha Secor, A. F. Fisher, Julius Rosenberger, Moses Rose, and Peter Terwilliger, defendants.

Now come the parties, by their solicitors, and the court having considered and being fully advised upon the exceptions of Charles E. Shelton, Roxanna Shelton, and Andrew S. McMillan to the report of the master, filed herein on the 15th day of May, 1879, overruled said exceptions. This cause being now brought on to be heard upon the bill of complaint filed herein, taken as confessed by the defendants, James E. Morrow, Martha Secor, A. F. Fisher, Julius Rosenberger, Moses Rose, Peter Terwilliger, Ellis Greenebaum, Gerhard Foreman, and Andrew S. McMillan, the several answers of of said defendants, Charles E. Shelton, Roxann Sheiton, and Elizabeth Blue, the replications thereto together with the bill of complaint, and upon the report of Henry W. Bishop, master in chancery of this court, which report bears date the first day of April, A. D. 1879, and was made in pursuance of an order of this court heretofore made of this cause, referring it to the said master to take the proofs in said cause and to compute the amount due to the said complainant upon the bond and coupon or notes and the mortgage, and the covenant therein contained, mentioned, and set forth in said bill of complaint, and which report was filed herein on the twenty-eighth (28) day of April, A. D. 1879. On reading said report,
22 upon motion of counsel for the complainant, no further cause to the contrary having been shown, it is ordered, adjudged, and decreed, and this court, by virtue of the authority in it vested, doth order, adjudge, and decree that the said report and all things therein contained do stand ratified and confirmed.

And this court being fully advised in the premises, doth find and adjudge and decree that all the material allegations in the said bill of complaint contained have been fully proved, and that there is at the date of the entry of this decree due to the complainant in this cause from the said defendant Charles E. Shelton the sum of twelve thousand six hundred and sixty-seven dollars and twenty-five cents, being the amount of said report, with 6 % interest thereon from said date thereof, and that the complainant has a valid and first lien therefor upon the lands and premises hereinafter described, and that the rights and interests of the defendants in this cause in said lands are subject and inferior to the lien of said complainant.

It is, therefore, upon motion of counsel for the complainant, ordered, adjudged, and decreed, and this court, by virtue of the power and authority in it vested, doth order, adjudge, and decree that the said defendant Charles E. Shelton, or some of the other defendants in this cause, pay or cause to be paid to the complainant, within ten days from the date of the

entry of this decree, the sum of twelve thousand six hundred and
23 sixty-seven dollars and twenty-five cents, with interest thereon at
the rate of six per centum per annum from the date of the entry of this decree to the day of such payment, and also pay into court the costs in this cause to be taxed, and in default of so doing, that all and singular the said premises mentioned and described in the said bill of complaint and hereinafter described, or so much thereof as may be sufficient to satisfy the amount due to the complainant as hereinbefore adjudged, together with interest and the costs in this case, and which may be sold separately, without material injury to the parties interested, be sold at public auction, to the highest bidder, for cash, by Henry W. Bishop, master in chancery of this court; and it is further ordered that he make such sale at the south front door of the court-house in Pontiac, in the county of Livingston and State of Illinois, and that he give public notice of the time and place of holding such sale by publishing an advertisement thereof once a week for three successive weeks in a newspaper published in Pontiac, in the county of Livingston and State of Illinois, the first publication of such notice being not less than twenty-one days previous to the time of such sale; that at such sale the complainant, or any of the parties to this cause, may be the purchaser or purchasers; that the said master shall give to any purchaser at such sale a certificate of sale, in pur-
24 suance of the law of the State of Illinois concerning the sale of real estate by virtue of a decree of foreclosure of mortgage, and shall cause a duplicate of such certificate to be recorded as required by law.

The premises authorized to be sold under and by virtue of this decree are the following, to wit: All the certain lots, pieces, or parcels of land situate, lying, and being in the county of Livingston and State of Illinois, and described as being the west half of the southwest quarter ($\frac{1}{4}$) of section one (1); the southeast quarter of section two (2); the southwest quarter ($\frac{1}{4}$) of section ten (10); the undivided half ($\frac{1}{2}$) of the west half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section ten (10), and the east half ($\frac{1}{2}$) of the southeast quarter of section ten (10), all of said lands being in township number (28) twenty-eight north, range number four (4) east of the third principal meridian, in said county of Livingston and State of Illinois.

It is further ordered, adjudged, and decreed that the said master shall last offer and sell the following described portions of saidland, to wit: The southwest quarter ($\frac{1}{4}$) of section ten (10), and the undivided half ($\frac{1}{2}$) of west half of the southeast quarter ($\frac{1}{4}$) of section ten (10), town, county, and State aforesaid, and that the tracts last aforesaid shall sell for an amount not exceeding four thousand dollars ($4,000), with interest thereon at the rate of 6 % from the date of said master's report; that the said west half of the southwest quarter of section one (1), and the southeast quar-
25 ter ($\frac{1}{4}$) of section two (2), town, county, and State aforesaid, shall first be offered and sold, and next thereafter the said east half of the southeast quarter ($\frac{1}{4}$) of section ten (10) in the town, county, and State aforesaid, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging.

It is further ordered, that if the said premises, or any parcel thereof, shall at such sale be struck off and sold by the master to the complainant in this cause, the complainant shall be required to pay to the master only so much of the complainant's bid as shall, taken together with other mo-

neys paid to the master, at such sale, on bids for parcels by other persons, if any there be, be sufficient to satisfy the expenses of the sale, and the master's fees, disbursements, and expenses, and the costs of this suit, and also any excess of the remainder of the amount of said bid after such payment over the amount due the complainant under this decree for indebtedness secured by said mortgage.

It is further ordered that said master make report to this court of such sale, and of his acts and doings hereunder for approval and confirmation, and for further direction herein, and that he retain from the moneys received by him on said sale the amount of his fees, disbursements, and commissions thereon, and bring the residue of such moneys, if any, into court, to abide the further order of the court; and that he take the receipt of the clerk of this court therefor, and file the same with said report;

26 and if the price for which said premises shall be so sold shall be insufficient to satisfy the amount so found and adjudged to be due to the complainant, with the interest thereon, and the costs of suit and expenses of sale as aforesaid, that the said master specify the amount of such deficiency in his said report of sale.

And it is further ordered that the clerk of this court hold such moneys so to be paid him by said master subject to the further order and direction of this court in this cause.

It is further ordered that if any sale by said master under this decree shall be confirmed by this court, and if the land so sold shall not be redeemed according to the laws of the State of Illinois, the master in chancery of this court shall, after the expiration of the time allowed by law for such redemption, execute and deliver to the legal holder of any certificate of sale issued under this decree a deed of conveyance of the land in such certificate described, which shall not have been so redeemed. And it is further ordered, adjudged, and decreed that the defendants in this cause, and all persons claiming by, through, or under them, or either of them, since the filing of the original bill of complaint in this cause, be forever barred and foreclosed from all equity of redemption and claim of, in, and to said above-described land and premises, and any part and parcel thereof which shall be sold as aforesaid under this decree, and which shall not be redeemed according to law.

27 And it is further ordered, adjudged, and decreed that upon the execution and delivery of the deed or deeds of conveyance as aforesaid, the grantee or grantees, his or their heirs or assigns, be let into possession of the portion of said mortgaged premises so conveyed to him or them, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, on the production of said master's deed of conveyance, and of a certified copy of the order of this court confirming the report of said sale, surrender possession thereof to such grantee or grantees, his or their heirs or assigns.

To which defendant Charles E. Shelton excepts, and prays an appeal to the Supreme Court.

Your orators further aver that they are aggrieved by the said decree, and that they ought not to be bound thereby, nor should any such decree have been made or pronounced against your petitioners, neither ought your

petitioners to pay the sums of money in said decree appointed, and that the said decree is erroneous and ought to be reversed, and for error do, according to the form of the statute in such case made and provided and the course and practice of this honorable court, assign the errors in said decree, as follows:

28 First. Your petitioners say, and hope to maintain, that at the time of rendering said decree the indebtedness of your petitioners to said Edgar M. Van Kleeck did not exceed the sum of $4,000, and that the amount decreed, to wit, $12,667.25, is unjust, oppressive, and inequitable.

Second. That the amount of said decree, to wit, $12,667.25, is unjust and exorbitant and a great oppression on your petitioners.

Third. That said decree is not consistent with the evidence in the case, and is contrary thereto.

Fourth. That said decree is usurious, and grants and pronounces in favor of usurious interest, and gives usury and usurious interest to the complainant, and that a large amount of usury and usurious interest, to wit, about $5,000, is duly incorporated in and forms part of the amount of said decree.

Fifth. That said decree unjustly and oppressively discriminates against your petitioners in this, that it arbitrarily provides for selling your petitioners' homestead first, thereby exposing their farm and home to sacrifice, and it also provides that the farm and homestead of Elizabeth Blue shall not be sold for more than $4,000, thereby arbitrarily compelling a sale of your petitioners' homestead for $8,667.25 and the costs of sale.

Sixth. That said decree does not determine the rights or inter-
29 ests of any of the defendants except your petitioners and said Elizabeth Blue.

Seventh. That said decree has only been entered against a part of the defendants, leaving the suit still depending as to other defendants.

Eighth. Said decree is contradictory and shows that the same defendants made default and answered the bill and defended at the same time.

Ninth. Said decree is against the law and utterly inequitable, and that there are divers other errors and imperfections in said decree.

Your petitioners further aver that said decree was entered at the July term of said court A. D. 1879,, on the 28th day of the last-named month, and that said decree has been executed, and your petitioners have obeyed the same. That one of the masters in chancery of this court sold said real estate, as will hereinafter more fully appear, and that the complainants at said master's sale became the purchaser thereof, and that a writ of restitution was afterwards issued out of this court on the 7th day of March, A. D. 1881, and thereupon by virtue of said suit your petitioners were ousted from the possession of said premises and the said premises delivered to the said complainant Edgar M. Van Kleeck, and he put in possession of the same by the United States marshal of said district, and is now in possession thereof.

30 Your petitioners further aver that since the entry of said decree as aforesaid your petitioners have discovered new matter of consequence in said cause, and charge the fact to be that the sale of said premises by the said master in chancery was and is wholly and utterly illegal and void, and that said master either fraudulently or negligently failed to

sell said premises in pursuance of said decree, and that he did not sell said premises at the south front door of the court-house in Pontiac, Illinois, as commanded in said decree, and that on the contrary, he sold said premises at the north front door of the court-house in said Pontiac, in defiance of said decree.

Your petitioners further show that said master in chancery advertised said premises for sale, to be sold by him at the south front door of the said court-house, at the hour of one o'clock p. m., on the 30th day of September, A. D. 1879, and that he failed to sell said premises at said place, and that on the contrary he sold said premises at the north door of said court-house, at a place not advertised, and not frequented by people, and that in consequence of such fraud or negligence there were no bidders at said sale, except the complainant's agent, Mr. John W. Woodrow, who bid in said premises for the plaintiff at said complainant's own price and on his own terms, to the injury and oppression of your petitioners.

31 Your petitioners further aver that afterwards, and on the said 30th day of September, A. D. 1879, the said master in chancery attempted to make another sale of said premises, and after the hour of three o'clock p. m. he offered said premises again for sale at the south front door of said court-house, and as the sale of said premises was not advertised to take place at that hour last mentioned, there were no bidders at said last-mentioned sale, or pretended sale, except the plaintiff Van Kleeck's, said agent, who bid said premises in for the complainant at his own price and on his own terms.

Your petitioners further aver that said operations of said master in regard to said sale, prevented divers and sundry persons who desired to purchase said lands from being present at the sale or bidding on the same, thereby depreciating the price thereof and preventing competition among purchasers, and tended to the manifest injury and oppression of your petitioners.

Your petitioners further aver that afterwards a motion was entered in said court to set aside said sale by the master in chancery of said real estate, which motion was overruled by said court, all of which will more fully appear by the evidence and judge's certificate of evidence on the hearing of said motion now remaining in said court, and filed in said cause, to which your petitioners refer and make part of this bill of complaint for evidence herein.

32 Your petitioners are advised and insist that under the circumstances aforesaid, and in consequence of the discovery of such new matter as aforesaid, the said decree ought to be reviewed and reversed.

Your petitioners further aver that Andrew S. McMillan and Thomas H. Thompson now claim to have some interest in said real estate, which they claim have accrued to them since the rendition of said decree.

Your petitioners therefore pray that the said Edgar M. Van Kleeck, Andrew S. McMillan, and Thomas H. Thompson, and every of them, may be made parties defendant to this bill of complaint and summoned to answer the same, but not under oath, their oath or oaths as to their answer or answers hereto being hereby expressly waived, and that said decree and all the proceedings thereon may be reviewed and reversed, and that your honors decree, that these petitioners be put into possession of the said lands and tenements, and in the same situation in every respect as far as

circumstances will permit, as your orators would have been in case such decree had never been pronounced and executed, and that your petitioners may be relieved in all and singular the premises according to equity and good conscience, and that your petitioners may have such other and further relief as to your honors may seem meet and proper, and your
33 petitioners will ever pray, &c.

CHAS. J. BEATTIE,
Solicitor.

(Endorsed:) Filed the 22nd day of August, A. D. 1881. Wm. H. Bradley, clerk.

34 On the same day, to wit, the twenty-second day of August, in the July term, A. D. 1881, of said court, in the record of the proceedings thereof in said entitled cause appears the following, to wit, before the Hon. Thomas Drummond, circuit judge:

CHARLES E. SHELTON AND ROXANA SHELTON *vs.* EDGAR M. VANKLEECK, ANDREW S. MCMILLAN, and THOMAS H. THOMPSON.	17567. In chancery. Bill of review.

And now come Charles E. Shelton and Roxana Shelton and move the court here for leave to file their bill of review in this court, and it appearing that due notice of this motion was duly given to defendants' solicitor, and the court being sufficiently advised in the premises, it is ordered that leave be granted to said complainants to file their bill of review herein without prejudice.

Afterwards, to wit, on the ninth day of September, A. D. 1881, a writ of subpœna in chancery issued out of the office of the clerk of the said court against said defendants in said entitled cause, which said writ, together with the memorandum thereto attached and the return of the marshal thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA,
35 *Northern District of Illinois, ss:*

The United States of America to Edgar M. Van Kleeck, Andrew S. McMillan, Thomas H. Thompson, George Bennett, and John Antrim, greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of October next, to answer the bill of review, and amendment thereto, of Charles E. Shelton and Roxana Shelton, heretofore filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 9th day

of September, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the 106th.

[SEAL.] W. H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they, and each of them, shall enter their appearance in the clerk's
36 *of* office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

W. H. BRADLEY, *Clerk.*

I have served the within writ within my district in the following manner, to wit: Upon Andrew S. McMillan, therein named, on the 19th day of September, A. D. 1881. Also upon Thomas H. Thompson, therein named, on the 19th day of September, A. D. 1881. Also upon George Bennett, therein named, on the 19th day of September, A. D. 1881; also by personally delivering to each of them a true copy of the same on the aforesaid days. I also served the same upon the following-named defendant, not having been able to find him to serve personally, by leaving a true copy for him at his usual place of abode with an adult person and a member of his family, upon John Antrim on the 19th day of September, A. D. 1881, with Anna Antrim, his wife.

I did not serve Edgar M. Van Kleeck, the other defendant, not having been able to find him, or that he had any residence within my district.

A. M. JONES,
U. S. Marshal.
By R. D. SHERMAN,
Deputy.

(Endorsed:) Filed Oct. 1, A. D. 1881. W. H. Bradley, clerk.

37 Afterwards, to wit, on the twenty-first day of October, A. D. 1881, came said defendants, Edgar M. Van Kleeck, Andrew S. McMillan, Thomas H. Thompson, George Bennett, and John Antrim, by their solicitor, and filed in said clerk's office their demurrer to the bill of review herein, which said demurrer is in the words and figures following, to wit:

Demurrer to original bill of review.

In the circuit court of the United States for the northern district of Illinois.

CHARLES E. SHELTON AND ROXANA SHELTON *vs.* EDGAR M. VAN KLEECK, ANDREW S. MCMILLAN, THOMAS H. THOMPSON, GEORGE BENNET, and JOHN ANTRIM.	In chancery. Demurrer.

The joint and several demurrer of Edgar M. Van Kleeck, Andrew S. McMillan, Thomas H. Thompson, George Bennett, and John Antrim, defendants, to the bill of review of Charles E. Shelton and Roxanna Shelton, complainants.

The defendants and each of them, by protestation, not confessing or

acknowledging all or any of the matters and things in the said bill of complaint contained, to be true, in such manner and form as the same
38 are therein and thereby set forth and alleged, demur to said bill, and for cause of demurrer show :

First. That by the constant rules of this court a bill of review ought to be admitted to alter or change matters decreed only for error in law appearing in the body of the pleadings and decree as drawn and entered, and for newly discovered matter material to the issue, or such matter of which the complainant could not have notice at the time of the decree. But these defendants are, and each of them is, advised that the matter assigned by the said bill of review for cause of reversal of the said decree, as the same thereby appears by the complainant's bill, are neither any error in law apparent in the body of this decree and the pleadings, nor any such new matter as aforesaid.

Second. That all and singular the matters and things complained of in said bill of review which arose before the entry of said final decree in said cause were questions of fact heard and determined by the court in and by the said final decree, and as to said matters and things complained of as having occurred after the entry of said final decree, the same cannot, nor can the determination of said questions of fact had by the court at and before the said final decree be the subject of a bill of review, as they are advised by counsel.

Third. That complainants in said bill of review if not them-
39 selves aggrieved by the particular errors assigned in the decree cannot maintain said bill however injurious said decree may be to the rights of others.

Fourth. Because it appears by the record and certificate of evidence made a part of said bill of review, that complainant, Charles E. Shelton, was discharged in bankruptcy at and before the sale of the mortgage property under the decree of sale and hath no interest in the subject-matter of this litigation, and complainants do not show such an interest as will entitle them to bring said bill of review.

Fifth. That all parties to said original bill are not made parties to said bill of review.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of review, these defendants demur to the said bill, and to all the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their reasonable cost in this behalf sustained.

EDGAR M. VAN KLEECK,
ANDREW S McMILLAN,
THOMAS H. THOMPSON,
GEORGE BENNETT,
JOHN ANTRIM,

Defendants.

By J. I. & F. I. BENNETT,

Solicitors for said Defendants.

40 I hereby certify that in my opinion the foregoing demurrer to the bill of review of Charles E. Shelton and Roxanna Shelton is well founded in law and proper to be filed in the above cause, and that it is not filed for delay.

JOHN I. BENNETT,
Of Counsel for Def'ts.

STATE OF ILLINOIS,
Livingston County, ss:

Andrew S. McMillan, being duly sworn, says that he is defendant in said cause, and that the foregoing demurrer is not interposed for delay.

ANDREW S. McMILLAN.

Subscribed and sworn to before me this 19' day of Oct., 1881.

J. W. WOODROW, [SEAL.]
Notary Public.

(Endorsed:) Filed Oct. 21st, 1881. Wm. H. Bradley, clerk.

Afterwards, to wit, on the twelfth day of December, in the adjourned October term A. D. 1881, of said court, in the record of the proceedings thereof before the Hon. Henry W. Blodgett, judge, in said entitled cause appears the following entry, to wit:

CHARLES E. SHELTON ET AL.
vs.
EDGAR M. VAN KLEECK ET AL. } In chancery. Bill of review.

41 Now come the parties, by their solicitors, and the court having considered, and being now fully advised upon the demurrer of the defendants to the bill herein, sustains said demurrer.

And leave is given complainants to amend their bill herein.

Afterwards, to wit, on the seventeenth day of December, A. D. 1881, said complainants, Charles E. Shelton and Roxana Shelton, by their solicitor, filed in said clerk's office their amendments to said bill of review in said entitled cause. Which said amendments are in the words and figures following, to wit:

Amendment of bill.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof, December term, A. D. 1881.

CHARLES E. SHELTON AND ROXANA SHELTON
vs.
EDGAR M. VAN KLEECK ET AL. } In chancery. Bill of review.

To the honorable the judges of said court:

And now comes the said complainants, and by leave of the court herein

first had and received for that purpose, respectfully represents to the court here that Gerhard Foreman, Elias Greenebaum, and Elizabeth
42 Blue, James E. Morrow, Martha Secor, A. F. Fisher, Wm. M. McGregor, Peter Terwilliger, Julius Rosenberger, and Moses Rose have, or claim to have, some interest in the premises mentioned in the bill of complaint herein, to wit, the premises mortgaged by your orators and in controversy in this suit; therefore your orators pray that the said parties herein named may be made parties defendant to this bill of complaint, said parties and each of them being citizens of the State of Illinois, and parties defendant in the original bill now sought to be revived herein, and that process of subpœna issue to them and each of them the same as if they had been named as parties defendant in the original bill of review in this cause, and that they be compelled to answer this bill and make full and true answers herein, the same as if originally summoned herein; that the answer of said defendants in this cause under oath is hereby expressly waived, and complainants further pray as in and by their said original bill they have already prayed, &c.

CHAS. E. SHELTON,
ROXANNA SHELTON,
By CHAS. J. BEATTIE,
Their Solicitor.

CHAS. J. BEATTIE,
Solicitor.

(Endorsed:) Filed the 17th day of Dec., A. D. 1881. Wm. H. Bradley, clerk.

43 Afterwards, to wit, on the same day, to wit, the seventeenth day of December, A. D. 1881, came said defendants by their solicitor, and filed in said clerk's office their demurrer to amended bill of review in said entitled cause. Which said demurrer is in the words and figures following, to wit:

Demurrer to amended bill of review.

In the circuit court of the United States for the northern district of Illinois.

CHARLES E. SHELTON AND ROXANNA SHELTON
vs.
EDGAR M. VAN KLEECK, ANDREW S. McMILLANN, THOMAS H. THOMPSON, GEORGE BENNETT, JOHN ANDRIM, GERHARD FOREMAN, ELIAS GREENEBAUM, ELIZABETH BLUE, JAMES E. MORROW, MARTHA SECOR, A. F. FISHER, WM. McGREGOR, PETER TERWILLIGER, JULIUS ROSENBERGER, AND MOSES ROSE.

The joint and several demurrer of Edgar M. Van Kleeck, Andrew S. McMillan, Thomas H. Thompson, George Bennett, and John Andrim, defendants, to the amended bill of review of Charles E. Shelton and Roxanna Shelton, complainats.

These defendants, and each of them, by protestation, not confessing or

ackowledging all or any of the matters and things in the said bill of
44 complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows:

First. That by the constant rules of this court no bill of review ought to be admitted to alter or change matters decreed, only for error in law appearing in the body of the pleadings and decree as drawn and entered, and for new matter arising since the decree, or such matter of which the complainants could not have notice at the time of the decree; but these defendants are and each of them is advised that the matters assigned by the said bill of review for cause of reversal of the said decree, as the same thereby appears by the complainant's bill, are neither any error in law apparent in the body of the decree and the pleadings, nor any such new matter as aforesaid.

Second. That all and singular the matters and things complained of in said bill of complaint which arose before the entry of said final decree in said cause were questions of fact heard and determined by the court in and by the final decree. And as to said matters and things complained of as having occurred after the entry of said final decree, the same cannot, nor can the determination of said questions of fact had by the court at and before the said final decree, be the subject of a bill of review, as they are advised by counsel.

45 Third. Because it appears by the record in said cause that complainant Charles E. Shelton was discharged in bankruptcy at and before the sale of the mortgaged property under the decree of sale in said cause, and hath no interest in the subject-matter of this litigation, and the complainants do not show such an interest as will entitle them to bring said amended bill of review. Wherefore and for divers other good causes of demurrer appearing in the said amended bill of review, these defendants demur to the said bill, and to all of the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed, with their reasonable cost in this behalf sustained.

EDGAR M. VAN KLEECK,
ANDREW S. McMILLAN,
THOMAS H. THOMPSON,
GEORGE BENNETT, AND
JOHN ANDRIM,
By JOHN I. BENNETT,
Their Solicitor.

JOHN I. BENNETT,
Of Counsel.

I herby certify that, in my opinion, the foregoing demurrer of Edgar M. Van Kleeck, Andrew S. McMillan, Thomas H. Thompson, George Bennett, and John Andrim, defendants, to the amended bill of review
46 of Charles E. and Roxanna Shelton, complainants, is well founded in law, and proper to be filed in the above cause.

JOHN I. BENNETT,
Sol. for said Defe't.

(Endorsed:) Filed [illegible]

STATE OF ILLINOIS,
Cook County, ss:

John I. Bennett being sworn, says that he is a solicitor for said defendants, for whom he has above demurred, that his clients are all non-residents of said Cook County, and therefore he makes this affidavit & says that said demurrer is not interposed for the purpose of delaying said suit, or any proceedings therein.

JOHN I. BENNETT.

Subscribed and sworn to before me this 17th day of December, A. D. 1881.

FRANK I. BENNETT, [SEAL.]
Notary Public.

(Endorsed:) Filed Dec. 17, 1881. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the same day, to wit, the seventeenth day, of December, in said October adjourned term, A. D. 1881, of said court, in the record of the proceedings thereof in chancery, before Hon. Henry W. Blodgett, judge, appears the following entry in said entitled cause, to wit:

47 CHARLES E. SHELTON AND ROXANA Shelton
vs.
EDGAR M. VAN KLEECK, ANDREW S. McMILLAN, Thomas H. Thompson, George Bennett, John Andrim, Gerhard Foreman, Elias Greenebaum, Elizabeth Blue, James E. Morrow, Martha Secor, A. F. Fisher, Wm. M. McGregor, Peter Terwilliger, and Moses Rose. } In chancery. Bill of review.

The demurrer of defendants this day filed herein to the bill as amended in this cause is now submitted to the court by defendants' solicitor. And the court, after duly considering the same and being now fully advised in the premises, sustains said demurrer and orders that said bill of review be dismissed for want of equity at complainants' costs.

It is thereupon considered, adjudged, and decreed by the court that the bill of review herein be dismissed, and that the defendants herein do have and recover of the complainants therein their costs and charges by them about their defense in this behalf expended, amounting to the sum of thirty-nine dollars and five cents, and that execution issue herein therefor.

And thereupon said complainants, by their solicitor, pray an appeal herein to the Supreme Court of the United States, which said appeal is allowed by the court upon their giving bond herein in the
48 penal sum of five hundred dollars within sixty days, with security, to be approved by the court.

Afterwards, to wit, on the ninth day of February, A. D. 1882, came said complainants, by their solicitor, and filed in said clerk's office an appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents, that we, Charles E. Shelton, and Jefferson P. Houston [illegible] surety, in the county [illegible]

firmly bound unto Edgar M. Van Kleeck, Andrew S. McMillan, George Bennett, John Antrim, and Thomas Thompson, of , in the county of , and State of , in the sum of two thousand dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 13th day of January, A. D. 1882.

The condition of the above obligation is such that whereas the said Edgar M. Van Kleeck, Andrew S. McMillan, George Bennett, John Antrim, and Thomas Thompson, did, on the 17th day of December,
49 A. D. 1881, in the circuit court of the United States in and for the northern district of Illinois, recover a judgment against the above-bounden Charles E. Shelton and Roxanna Shelton, to wit, that a demurrer was sustained by said court to the bill of complaint in said cause, and said bill dismissed, and a judgment rendered for the costs of said suit against Charles E. Shelton and Roxanna Shelton, from which order of said court sustaining said demurrer and dismissing said bill and said judgment for costs, the said Charles E. Shelton and Roxanna Shelton have prayed for and obtained an appeal to the Supreme Court ofthe United States of America:

Now, therefore, if the said Charles E. Shelton and Roxanna Shelton shall prosecute their appeal with effect, and if they fail to make their plea good, shall answer all damages and costs, then this obligation to be void; otherwise to remain in full force and effect.

ROXANA SHELTON. [SEAL.]
CHARLES E. SHELTON. [SEAL.]
J. P. HOUSTON. [SEAL.]
BENJ. F. BURT. [SEAL.]

Signed, sealed, and delivered by J. P. Houston, in presence of—
E. A. DRUMMOND,
Deputy Clerk.

Signed, sealed, and delivered by Benjamin F. Burt, in presence of—
E. A. DRUMMOND,
Deputy Clerk.

50 STATE OF ILLINOIS,
Livingston County, ss:

I, John W. Woodrow, a notary public in and for said county, do hereby certify that on this day the within named obligors duly appeared before me at my office in Pontiac, in said county, each being well known to me as Charles E. Shelton and Roxana Shelton, and known to me to be the identical persons of that name, whose names are signed to said bond, and each severally acknowledged that they had signed, sealed, and delivered said bond, that they knew its contents, and that it was their act and deed, at this date.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this day of February, A. D. 1882.

[NOTARIAL SEAL.] JOHN W. WOODROW,
Notary Public.

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Feb'y 9, 1882. Wm. H. Bradley, clerk.

51 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct and complete transcript from the records of said court of the following files and record entries therein, to wit: the bill of review, the order allowing same to be filed, the subpœna with return thereon, the demurrer filed October 21st, A. D. 1881, the order of court thereon, the amended bill, the demurrer to same filed December 17th, A. D. 1881, the order sustaining same and dismissing bill, and allowance of appeal, and the appeal bond, as the same appears of record and on file, the originals of which now remain in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago in said district this 18th day of February, A. D. 1882.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 888. Charles E. Shelton and Roxanna Shelton, appellants, vs. Edgar M. Van Kleeck, Andrew S. McMillan, et al. N. Illinois C. C. U. S. Filed 31st July, 1882.

16-532

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 888.

CHARLES E. SHELTON AND ROXANNA SHELTON, APPELLANTS,

vs.

EDGAR M. VAN KLEECK, ANDREW S. MILLAN ET AL.

FILED OCTOBER 24, 1882.

SUPREME COURT OF THE UNITED STATES.

No. 888.

CHARLES E. SHELTON AND ROXANNA SHELTON, APPELLANTS.

vs.

EDGAR M. VAN KLEECK, ANDREW S. MILLAN ET AL.

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1 CERTIFICATE OF EVIDENCE.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof, December term, A. D. 1880. In chancery.

E. M. VAN KLEECK
vs.
CHAS. E. SHELTON, ROXANA SHELTON, ANDREW S. McMILLAN, et al.
} Motion to set aside master's sale.

Be it remembered that on the hearing of the motion to set aside the master's sale of real estate in said cause at said term, the said defendants, to maintain the issue on their part, offered in evidence and read the six following affidavits:

Affidavit of Z. Hanson.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof. In chancery.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON ET AL.

2 Zackarias Hanson, of said county, being first duly sworn, on his oath says that he was present at the south door of the court-house in Pontiac on the 30' Sept., 1879, at the sale of the real estate involved in this suit, and saw the master in chancery, Henry W. Bishop, make such sale, and at the time the sale was made it was after two p. m., and affiant believes it was nearly or quite three o'clock p. m.; that there was but very few persons present at such sale, not to exceed ten persons in all, and no bidder attended except John W. Woodrow.

ZACHARIAS HANSON.

Subscribed & sworn before me this 3d Janu'y, 1881.
R. R. WALLACE,
County Judge.

Affidavit of John Neifing.

UNITED STATES OF AMERICA,
Northern District of Illinois,

In the circuit court thereof.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON.

John Neifing, of the county of Livingston, in the State aforesaid,

3 being first duly sworn, on his oath says that on September 30, 1879, he attended at the sale of real estate made by Henry Bishop, of Chicago, at the south door of the court-house in Pontiac, in said county; that the sale did not take place, as affiant believes, until after three o'clock p. m. of that day; that affiant saw one of the bystanders take out his watch, and when inquired of by affiant as to the time of day, said bystander replied that it was 20 minutes past three o'clock, and affiant believes it was as late as the time announced; that at this time there was but very few persons present.

JOHN NEIFING.

Subscribed and sworn before me this 4th day of January, 1881.
[SEAL.] A. W. COWAN,
Notary Public in & for Livingston Co., Ills.

4 *Affidavit of Charles E. Shelton.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof. In chancery.

E. M. VAN KLEECK
vs.
CHAS. E. SHELTON ET AL.

Charles E. Shelton, a defendant in the above-entitled cause, being first duly sworn, declares and says on oath that the master in chancery of said court, Mr. Henry W. Bishop, advertised the real estate of affiant to be sold, in pursuance of the decree in said cause, on the 30th day of September, A. D. 1879, at the hour of one o'clock p. m., at the south front door of the court-house, in the city of Pontiac, in Livingston County, Illinois, as will more fully appear from the advertisement of sale, which is hereunto attached marked A; that affiant went to the south front door of said court-house, in Pontiac aforesaid, about 15 minutes before one o'clock p. m., on said day, for the purpose of being present at said sale; that affiant then found several persons at said south front door of said court-house,
5 who were waiting for the sale to take place; that some of the persons waiting there said they had come to purchase said real estate, and to bid for the same; that affiant and said persons waited at said south front door from that time until about 15 minutes after two o'clock on said day, and that during that time said master did not sell, or attempt to sell, said real estate at said south front door of said court-house; that affiant and said persons then went away from said south front door, and affiant avers that about three o'clock, or a few minutes after three o'clock, on said day, the said master in chancery came to said south front door of said court-house, after all the bidders had gone away, and offered said real estate for sale, and sold the same to the agent of the said plaintiff or complainant, and that said sale was not made until about five or ten minutes after 3 o'clock p. m. of said day, nor commenced before that time. Affiant further avers that said master in chancery made a mistake in the place of sale in the first instance, and first called said sale at the north front door of

6 said court-house, and sold the same there; that he afterwards discovered his mistake and sold the same again at the south front door, as aforesaid.

C. E. SHELTON,

Subscribed and sworn to before me this 22nd day of December, 1880.

[SEAL.] A. W. COWAN,
Notary Public in and for Livingston County, Ill.

Affidavit of Oliver H. Blue.

THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof. In chancery.

E. M. VAN KLEECK
vs.
CHAS. E. SHELTON ET AL.

Oliver H. Blue, being first duly sworn, declares and says on oath that affiant is a resident of the county of Livingston, in the State of Illinois; that on Tuesday, the 30th day of September, A. D. 1879, affiant was in the city of Pontiac, in said county, and having learned that there was to be a sale of the real estate of the defendant Shelton, by Mr. Bishop, the master in chancery of said court, at the south front door of the
7 court-house, in Pontiac, at one o'clock p. m. of said day, affiant went to the south front door of the court house, in said city, about five minutes before one o'clock p. m. of that day, expecting to witness or see said real estate sold by said master in chancery; and affiant avers that he remained at said south front door of said court-house from about five minutes before one o'clock p. m., as aforesaid, until about fifteen minutes past two o'clock p. m. of said day, and that during the time aforesaid the said master in chancery did not offer for sale or sell or attempt to sell said real estate; that about three o'clock or a short time afterwards on said day affiant saw some persons standing in front of the court-house, at the south front door thereof, and affiant again went there to see what was going on, and the master in chancery was then commencing to sell said real estate; that affiant then looked at his wat'h and found that it was then ten minutes past three o'clock.

OLIVER H. BLUE.

8 Subscribed and sworn to before me this 22nd day of December, 1880.

[SEAL.] A. W. COWAN,
Notary Public in & for Livingston Co., Ill.

Affidavit of Samuel Bond.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON.

Samuel Bond, of Livingston County, Illinois, being first duly sworn, on his oath says that he is a resident of said county, and knows the real estate advertised to be sold by Henry W. Bishop, the master in chancery of the U. S. court, in Cook County, Illinois, and has frequently seen the advertisement of said sale and the land described therein and involved in the above-entitled cause; that said sale thereof was advertised to take place on the 30th Sept., 1879; that affiant was present at one o'clock p. m. of that day, at the south door of the court-house, in Pontiac,
9 for the purpose of attending said sale there advertised to take place, and remained there until half-past two o'clock or later, and that many others were present with affiant, and some of them there declared that they were there for the purpose of bidding at such sale when the same should take place; that while affiant was there no sale took place; that affiant then left said place of sale & went out into town, and remained somewhere about a half hour and returned to the court-house; and on affiant's return he saw the said Bishop, and as he approached the south door through the hall of the building heard said Bishop say that he guessed he must have made a mistake in the place where said sale was advertised to take place.

That at about three p. m. of that day said Bishop did offer for sale & did sell said premises, or the same were struck off, to one J. W. Woodrow; that when said sale did take place a large proportion of the intended bidders or persons attending said place of sale at one o'clock p. m. had gone 'way & did not return & were not present when the sale did actually take place.

SAMUEL H. BOND.

10 Subscribed & sworn before me this 24th Dec., 1880.
[SEAL.] ZEPH. WINTERS, *Clerk.*

Affidavit of Elizabeth Blue.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON.

Elizabeth Blue, being first duly sworn, on oath says that she is a resi-

dent of Livingston County, in the State aforesaid; that she knows the real estate advertised to be sold by Henry W. Bishop, master in chancery of the U. S. court in Cook County, Illinois, and has frequently seen the advertisement thereof purporting to have been made by him and to take place in pursuance of the decree of said court; that on the 30th day of September, 1879, affiant was present, and at one o'clock p. m. of that day, at the south front door of the court-house in Pontiac, Illinois, for the purpose of attending said sale there advertised to take place, and re-
11 mained at said door until after two o'clock p. m., and that many others were there at the same time, some with the avowed purpose of bidding upon the property when the same should be offered for sale; that until after two o'clock, and while affiant remained, no sale took place; that affiant then went out into town, and while so in town affiant heard from some person that a sale was still to take place at said south door; affiant then returned to said south door, where she found said Bishop; and affiant did then and there hear said Bishop say that he (Bishop) had made a mistake in selling the property at the north door instead of at the south door, where the same was advertised to take place.

Affiant says that about three o'clock p. m. of said 30th September, 1879, and after a large proportion of the intended bidders at such sale had retired, supposing said sale was not to take place, the said Bishop proceeded to again sell the premises described in said decree.

ELIZABETH + BLUE.

Subscribed & sworn before me this 22d Dec., 1880.

[SEAL.] A. W. COWAN,

Notary Public in & for Livingston County, Ill.

12 Said defendants also offered in evidence and read the notice of sale published by the master in chancery as follows, to wit:

(See page 22 of this record.)

The complainant, to maintain the issue on his part, offered in evidence and read the master's report of said sale, to wit:

Master's report of sale.

In the circuit court of the United States for the northern district of Illinois. In chancery.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON, ROXANNA SHELTON, Elizabeth Blue, Andrew S. McMillan, Gerhard Foreman, Elias Greenebaum, James E. Morrow, Martha Secor, A. F. Fisher, Julius Rosenberger, Moses Rose, and Peter Terwilliger.
} Master's report of sale.

To the honorable the judges of the said court:

13 The undersigned, Henry W. Bishop, as master in chancery of the said court, respectfully reports that it was in a decree of the said court entered herein on the 28th day of July, A. D. 1879, among other things, ordered, adjudged, and decreed that the said defendant

Charles E. Shelton, or some of the other defendants in this cause, pay, or cause to be paid, to the complainant, within ten days from the date of the entry of the said decree, the sum of twelve thousand six hundred and sixty-seven dollars and twenty-five cents, with interest thereon at the rate of six per centum per annum from the date of the entry of the said decree to the day of such payment, and also pay into court the costs in this cause to be taxed, and in default of so doing that all and singular the premises mentioned and described in the bill of complaint and thereinafter and hereinafter described, or so much thereof as might be sufficient to satisfy the amount due the complainant as thereinbefore adjudged, together with interest and the costs in this case, and which might be sold separately without material injury to the parties interested, be sold at public
14 auction to the highest bidder, for cash, by Henry W. Bishop, master in chancery of this court; and it was further ordered that he make such sale at the south front door of the court-house in Pontiac, in the county of Livingston, and State of Illinois, and that he give public notice of the time & place of holding such sale by publishing an advertisement thereof once a week for three successive weeks in a newspaper published in Pontiac, in the county of Livingston, and State of Illinois, the first publication of such notice being not less than twenty-one days previous to the time of such sale; that at such sale the complainant, or any of the parties to this cause, might be the purchaser or purchasers; that the said master should give to any purchaser at such sale a certificate of sale in pursuance of the law of the State of Illinois concerning the sale of real estate by virtue of a decree of foreclosure of mortgage, and should cause a duplicate of such certificate to be recorded as required by law.

That in accordance with said decree, said defendants having made
15 default in the payment of the moneys in said decree mentioned within said period of ten days, and the same remaining wholly unpaid, the undersigned, in accordance with the said decree, as such master in chancery, advertised said premises and property for sale at public auction to the highest bidder, for cash in hand, in the Pontiac Sentinel, a weekly newspaper of general circulation printed and published in the city of Pontiac, in the county of Livingston, and State of Illinois, the date of the first paper containing said advertisement being the third (3d) day of September, A. D. 1879, and the date of the last paper containing the same being the twenty-fourth (24th) day of September, A. D. 1879, said advertisement having been published in said paper four (4) successive weeks, to wit, four (4) times prior to day of sale, as appears by a certified copy of said advertisement and the certificate of publication thereof hereto attached and made a part hereof.

That in accordance with the said decree, and in pursuance of the order of the said court herein, and on the thirtieth (30th) day of
16 September, A. D. 1879, in Pontiac, in the county of Livingston, and State of Illinois, the undersigned, as such master in chancery, did offer the premises and property in said advertisement & decree mentioned & described as follows, to wit: All the certain lots, pieces, or parcels of land situate, lying, & being in the county of Livingston and State of Illinois, and described as being the west half ($\frac{1}{2}$) of the southwest ($\frac{1}{4}$) of section one (1); the southeast quarter ($\frac{1}{4}$) of section two (2); the southwest quarter ($\frac{1}{4}$) of section ten (10); the undivided half ($\frac{1}{2}$) of the west

half of the southeast quarter (¼) of section ten (10), and the east half (½) of the southeast quarter of section ten (10), all of said lands being in township number twenty-eight (28) north, range number four (4) east of the third principal meridian in the said county of Livingston and State aforesaid, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, for sale at public auction to the highest and best bidder for cash in hand and as follows, to wit: The undersigned, as directed in the said decree, first offered for sale the west
17 half (½) of the southwest quarter (¼) of section one (1); the southeast quarter (¼) of section two (2), in the following manner, to wit: The undersigned first offered same for sale by the acre separately, then in separate tracts of forty acres and twenty acres and ten acres, and in any quantity less than the whole and as might be desired, and there being no bidders to either of said offers, the undersigned then offered the whole of said west half of the southwest quarter of section one and the southwest quarter of section two for sale together, and then & there struck off and sold the same to said complainant for the sum of sixty-three hundred dollars ($6,300), that sum being the highest & best sum bid for the same, and he being the highest and best bidder therefor; the undersigned (as directed in the said decree) then offered for sale the east half of the southeast quarter of section ten in the following manner, to wit: The undersigned first offered the same for sale by the acre separately, then in separate tracts of ten acres, and twenty acres, and forty acres, and sixty acres, and
18 and in any quantity less than the whole and as might be desired; and, there being no bidders to either of said offers, the undersigned then offered the whole of said east half of the southeast quarter of section ten for sale together, and then and there struck off and sold the same to said complainant for the sum of twenty-one hundred dollars ($2,100), that sum being the highest and best sum bid for the same, and he being the highest and best bidder therefor. The undersigned (as directed in the said decree) then offered for sale the southwest quarter of section ten and the undivided half of the west half of the southeast quarter of section ten (being the remainder of the premises & property hereinbefore firstly described) in the following manner, to wit: The undersigned first offered the same for sale by the acre separately, then in separate tracts of ten acres, forty acres, sixty acres, eighty acres, and in any quantity less than the whole and as might be desired; and, there being no bidders to either of said offers, the undersigned then offered the whole of the said southwest quarter of sec-
19 tion ten (being a portion of said lastly described premises), and no one bid for same offered in that way. The undersigned then offered for sale said southwest quarter of section ten and the undivided half of the west half of the southeast quarter of section ten together, and then and there struck off and sold the same to the said complainant for the sum of forty-one hundred & nineteen dollars and thirty-three cents ($4,119.33), that sum being the highest and best sum bid for the same, and he being the highest and best bidder therefor.

And, as provided for in said decree, said complainant (purchaser as aforesaid), by his solicitor, has only paid over to the undersigned, as such master in chancery, the sum of three hundred and forty-nine dollars and ninety cents, being the amount of the taxed costs herein, and has also paid the master's fees, commissions, and disbursements on said sale.

And the undersigned further reports that he has executed and delivered to said purchaser the certificates of sale directed in said decree to be executed, and has filed in the office of the recorder of deeds of said
20 Livingston County, Illinois, duplicates of such certificates, paying the fees for the record thereof.

A particular statement of the said sale is hereto annexed, made a part hereof, and marked Exhibit A.

All of which is respectfully submitted,

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated Chicago, October 8th, A. D. 1879.

EXHIBIT A.

1879.		
28th July.	Decree for the sum of.....	$12,667 25
30' September.	Interest thereon at 6 % from the date of decree.....	130 88
	Taxed costs.....	349 90
		$13,148 03
	Master's commissions on sale.....	187 78
	Certificate of sale.....	1 50
	Paid recording duplicates.....	2 55
	Paid advertising sale.....	10 00
	Expenses attending sale.....	6 75
	Report of sale.....	5 00
		$13,361 61
	Sold to complainant for.....	12,519 33
	Deficiency.....	$842 28

21 EXHIBIT B.

Amount for which the southwest quarter of section ten & the undivided half of the west half of the southeast quarter of section ten was directed to be sold not exceeding.....	$4,000
And interest thereon at the rate of 6 % from date of the master's report, to wit.....	119 33
Sold to complainant for.....	$4,119 33

Received of H. W. Bishop, master in chancery, the sum of three hundred & forty-nine dollars and ninety cents, being the amount of taxed costs herein.

WM. H. BRADLEY, *Clerk.*

Settled with H. W. Bishop, master in chancery, in accordance with above statement.

JOHN P. BENNETT,
Complainant's Solicitor.

22 *Notice of sale by the master.*

MASTER'S SALE.

UNITED STATES OF AMERICA:

In the circuit court of the United States for the northern district of Illinois. In chancery.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON, ROXANNA SHELTON, Elizabeth Blue, Andrew S. McMillan, Gerhard Foreman, Elias Greenebaum, James E. Morrow, Martha Secor, A. F. Fisher, Julius Rosenberger, Moses Rose, and Peter Terwilliger.

In pursuance of a decree of the said court entered in the above-entitled cause on the 28th day of July, A. D. 1879, I, Henry W. Bishop, master in chancery of the said court, will sell at public auction, to the highest and best bidder, for cash in hand, and in the manner directed in said decree, at the south front door of the court-house in Pontiac, in the county of Livingston and State of Illinois, on Tuesday, the 30th day of September, A. D. 1879, at one o'clock in the afternoon of the said last-named day, the premises and property in the said decree mentioned and described as follows, to wit:

All the certain lots, pieces, or parcels of land situate, lying, and
23 being in the county of Livingston and State of Illinois, and described as being the west half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section one (1), the southeast quarter ($\frac{1}{4}$) of section two (2), the southwest quarter ($\frac{1}{4}$) of section ten (10), the undivided half ($\frac{1}{2}$) of the west half of the southeast quarter ($\frac{1}{4}$) of section ten (10), and the east half ($\frac{1}{2}$) of the southeast quarter of section ten (10), all of said lands being in township number twenty-eight (28) north, range number four (4) east of the third principal meridian, in the said county of Livingston and State aforesaid, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

JOHN P. BENNETT,
Complainant's Solicitor.

Dated Chicago, Sept. 3d, A. D. 1879.

STATE OF ILLINOIS,
Livingston County, ss:

I, Fred. L. Alles, publisher of the Pontiac Sentinel, a weekly public newspaper printed and published in Pontiac, in said county, hereby
24 certify that the advertisement hereto annexed relating to the matter of master's sale, E. M. Van Kleeck vs. C. E. Shelton et al., has

been published in said paper, in every copy and impression thereof, for four weeks successively of the issues commencing Sept. 3d, 1879, and ending Sept. 24, 1879, which are the dates of the first and last papers containing the same.

Given under my hand this 25' day of September, A. D. 1879.

FRED. L. ALLES, *Publisher.*

Printer's fees, $10.00.

(Endorsed:) Filed Oct. 10, 1879. W. H. Bradley, cl'k.

25 The complainant also offered a statement in writing of the facts appearing on the face of the records of this and the district court, and also stating that the defendant, Shelton, was present when the sale was made by the master, which statement in writing was admitted by counsel for the said defendant in open court, the said Charles E. Shelton being present and assenting to said statement in writing and admission in open court, and agreeing that the facts stated therein were true, and agreeing that the decree and records referred to in said statement in writing might be treated as evidence, the same as if offered and read.

STATEMENT.

Circuit court of the United States, northern district of Illinois. Dec. term, A. D. 1880. In chancery.

EDGAR M. VAN KLEECK
vs.
CHAS. E. SHELTON ET AL.

1. Bill filed Dec. 21, 1877.
2. Decree of sale, July 28, 1879.
3. Sale under decree, Sept. 30, 1879.
4. Assignee in bankruptcy, app't'd October 23, 1879.

26 In the district court of the United States for the northern district of Illinois.

IN THE MATTER OF
CHARLES E. SHELTON, BANKRUPT. } In bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

To S. P. AVERY, Esq., of Morris, in the county of Grundy and State of Illinois:

I do hereby certify to you that you were duly appointed assignee of the estate and effects of the above-named bankrupt, at the first meeting of creditors, on the 22nd day of October, A. D. 1879, subject to approval by the court, and I do further certify that no creditors were present or duly represented at said meeting, and that you are required forthwith to notify

the undersigned, a register in bankruptcy of the district aforesaid, of your acceptance or rejection of the said trust.

Dated at Morris, the 22nd day of October, A. D. 1879.

COLQ'N GRANT,
Register in Bankruptcy.

Approved:

H. W. BLODGETT,
District Judge.

To whom it may concern:

27 Be it known that I hereby signify my acceptance of the trust of assignee of the estate of the above-named bankrupt, this 23rd day of October, A. D. 1879.

S. P. AVERY,
Assignee.

(Endorsed:) Filed Jan. 29, 1880. Wm. H. Bradley, clerk.

28 5. *Discharge.—Issued May* 28, 1880.

29 District court of the United States, northern district of Illinois.

Whereas Charles E. Shelton, of Rook's Creek, in the county of Livingston, in said district, has been duly adjudged a bankrupt under the Revised Statutes of the United States, title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf; it is therefore ordered by the court that said Charles E. Shelton be forever discharged from all debts and claims which by said title are made provable against his estate, and which existed on the thirtieth day of August, A. D. eighteen hundred and seventy-eight, on which day the petition for adjudication was filed by him, Charles E. Shelton, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of said court, at Chicago, in the said district, this twenty-eighth day of May, A. D. eighteen hundred and eighty.

H. W. BLODGETT, *Judge.*
[SEAL.] WM. H. BRADLEY, *Clerk.*

30 6. Report of sale was made Oct., 1879, and was confirmed under 83d rule November, 1879, and was subsequently confirmed by special order.

31 Afterwards, to wit, on the fifteenth day of December, in the adjourned October term of said court, A. D. 1880, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

E. M. VAN KLEEK
vs.
CHARLES E. SHELTON, ROXANNA SHELTON, Elizabeth Blue, Andrew S. McMillan, Gerhard Foreman, Elias Greenebaum, James E. Morrow, Martha Secor, A. F. Fisher, Julius Rosenberger, Moses Rose, and Peter Terwilliger. } In chancery.

And now again comes the complainant, by his solicitor, John P. Bennett, and this cause comes on to be further heard upon the report
32 of sale by Henry W. Bishop, master in chancery, filed herein on the tenth day of October, A. D. 1879, and thereupon, on motion of said complainant's solicitor, no cause to the contrary having been shown, and said sale and the actings and doings in said report mentioned appearing to have been done in conformity to law and the order of this court, it is ordered and decreed that said report and sale and the aforesaid actings and doings of said master in chancery be, and they are, fully approved and confirmed.

And it appearing to the court from said report that the said master has, as required by said decree, paid into the court and taken the receipt of W. H. Bradley, esq., clerk therefor, and filed the same with his report, the sum of three hundred and forty-nine dollars and ninety cents, being the amount of the taxed costs in said cause, and that after deducting the same, together with the master's fees, commissions, and disbursements, there remains to be applied upon the amount due to said complainant under said decree the sum of eleven thousand nine hundred and fifty-five dollars and eighty-five cents, it is ordered that said clerk credit said last-mentioned sum
33 on said decree as paid to said complainant on the thirtieth day of September, A. D. 1879, and in satisfaction of the said decree.

7. When the sale was finally made, as reported, Chas. E. Shelton was present.

It is admitted that the above facts appear by the records in this and the district court, except as to the last, and that the latter is true.

(Endorsed:) Filed Jan. 12, 1881. W. H. Bradley, cl'k.

I certify that the above and foregoing is a correct statement of all the evidence offered on the hearing of said motion.

THOMAS DRUMMOND.

(Endorsed:) Filed Mc'h 5, 1881. W. H. Bradley, cl'k.

34 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the certificate of evidence on motion to set aside sale, together with the papers therein called for filed in said court March fifth, A. D. 1881, with the exception of the bill of complaint, decree of sale, and sale under decree in the cause wherein E.

M. Van Kleeck is the complainant and Charles E. Shelton, Roxanna Shelton, et al., are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this nineteenth day of October, A. D. 1882.

[SEAL.] WM. H. BDADLEY, *Clerk.*

35 It is stipulated and agreed by the parties in the above case that the foregoing shall be filed as a further transcript of the record in said cause, under and in pursuance of the stipulation heretofore filed with the clerk, and that said further transcript is to be read in connection with and immediately following the words "make a part of this bill of complaint for evidence herein," occurring on page 31 of original transcript now filed, and page 13 of the printed copy thereof, and we hereby consent that the court may enter the proper order in that behalf.

Oct. 20, 1882.

L. E. PAYSON AND
CHAS. J. BEATTEE,
Counsel for Appellants.
JOHN I. BENNETT,
Counsel for Appellees.

(Indorsement on cover:) Supreme Court U. S. 1882, October term. No. 888. Charles E. Shelton et al., appellants, vs. Edgar M. Van Kleeck et al. Stipulation of counsel and addition to record. Filed 24th October, 1882.

15-532

SUPREME COURT
FILED
DEC 8 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 888.

October Term, A. D. 1882.

CHARLES E. SHELTON AND ROXANNA SHELTON,
Appellants.
vs.
EDGAR M. VAN KLEECK, ANDREW S. McMILLAN, et al.
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument of Appellants.

LEWIS E. PAYSON, CHARLES J. BEATTIE,
Attorneys for Appellants.

CHICAGO:
RICHARDS & THAYER, PRINTERS, 201 CLARK ST.
1882.

Supreme Court of the United States.

No. 888.

CHARLES E. SHELTON AND ROXANNA SHELTON,
Appellants,
vs.
EDGAR M. VAN KLEECK, ANDREW S. McMILLAN, et al.
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument of Appellants.

May it please the Court:

The case at bar is an appeal prosecuted from a decretal order entered in the court below by the judge of the District Court, sitting in the Circuit Court, sustaining a demurrer to appellants' bill of review, and dismissing the bill.

The bill of review that the judge of the District Court dismissed so summarily was exhibited by appellants for a two-fold purpose: first, to reverse the former decree of the Circuit Court entered by the same judge, for

errors of law appearing on the face of the record in the case sought to be reviewed, and, second, on account of new matter which had arisen out of facts and circumstances which had occurred in certain proceedings in the case subsequent to the entry of the decree, and pertinent to the issue, which new matter was a breach of the decree by the master in chancery who was charged with its execution; who, instead of selling the premises judicially as directed in the decree, and in the manner directed, entirely ignored the directions in the decree, and made a fraudulent sale of the premises at a different time and different place from the time and place mentioned and directed in the decree.

In their bill appellants, having set out the pleadings and decree in full, assigned the following errors as appearing on the face of the record in the former case:

1. "That at the time of rendering said decree the indebtedness of your petitioners to said Edgar M. Van Kleeck did not exceed the sum of $4,000, and that the amount decreed, to-wit, $12,667.25, is unjust, oppressive, and inequitable."

2. "That the amount of said decree, to-wit, $12,667.25, is unjust and exorbitant and a great oppression on your petitioners."

3. "That said decree is not consistent with the evidence in the case, and is contrary thereto."

4. "That said decree is usurious, and grants and pronounces in favor of usurious interest, and gives usury and usurious interest to the complainant, and that a large amount of usury and usurious interest, to-wit, about $5,000, is duly incorporated in and forms part of the amount of said decree."

5. "That said decree unjustly and oppressively discriminates against your petitioners in this, that it arbitrarily provides for selling your petitioners' homestead first, thereby exposing their farm and home to sacrifice, and it also provides that the farm and homestead of Elizabeth Blue shall not be sold for more than $4,000, thereby arbitrarily compelling a sale of your petitioners' homestead for $8,667.25 and the costs of sale."

6. "That said decree does not determine the rights or interests of any of the defendants except your petitioners and said Elizabeth Blue."

7. "That said decree has only been entered against a part of the defendants, leaving the suit still pending as to other defendants."

8. "Said decree is contradictory and shows that the same defendants made default and answered the bill and defended at the same time."

9. "Said decree is against the law and utterly inequitable, and that there are divers other errors and imperfections in said decree."

Appellants then alleged the following new matter:

"Your petitioners further aver that since the entry of said decree as aforesaid your petitioners have discovered new matter of consequence in said cause, and charge the fact to be that the sale of said premises by the said master in chancery was and is wholly and utterly illegal and void, and that said master either fraudulently or negligently failed to sell said premises in pursuance of said decree, and that he did not sell said premises at the south front door of the court house in Pontiac, Illinois, as commanded in said decree, and that, on the contrary, he sold

said premises at the north front door of the court house in said Pontiac, in defiance of said decree."

"Your petitioners further show that said master in chancery advertised said premises for sale, to be sold by him at the south front door of the said court house, at the hour of one o'clock P. M., on the 30th day of September, A. D. 1879, and that he failed to sell said premises at said place, and that on the contrary he sold said premises at the north door of said court house, at a place not advertised, and not frequented by people, and that in consequence of such fraud or negligence there were no bidders at said sale, except the complainant's agent, Mr. John W. Woodrow, who bid in said premises for the plaintiff at said complainant's own price and on his own terms, to the injury and oppression of your petitioners."

"Your petitioners further aver that afterwards, and on the said 30th day of September, A. D. 1879, the said master in chancery attempted to make another sale of said premises, and after the hour of three o'clock P. M. he offered said premises again for sale at the south front door of said court house, and as the sale of said premises was not advertised to take place at that hour last mentioned, there were no bidders at said last-mentioned sale, or pretended sale, except the plaintiff Van Kleeck's said agent, who bid said premises in for the complainant at his own price and on his own terms."

"Your petitioners further aver that said operations of said master in regard to said sale prevented divers and sundry persons who desired to purchase said lands from being present at the sale or bidding on the same, thereby depreciating the price thereof and preventing competition among purchasers, and tended to the manifest injury and oppression of your petitioners."

To this bill appellees interposed the usual stereotyped demurrer, which was sustained by the district judge, and the bill dismissed; thereupon the appellants appealed, and for the purpose of reversing this order of the district judge this appeal is prosecuted.

Appellants have therefore brought up the record of the Circuit Court, and have assigned thereon the following errors:

1. The court below erred in permitting appellees to make an issue of fact on the hearing of the demurrer below.

2. The Circuit Court erred in permitting matters not in the bill, and *de hors* the record, to be introduced and proved on the hearing of the demurrer below.

3. The Circuit Court erred in sustaining defendants' demurrer to complainant's bill below.

4. The Circuit Court erred in dismissing complainant's bill.

5. The Circuit Court erred in rendering the decree aforesaid in manner and form as aforesaid.

6. And other errors apparent in the record and proceedings aforesaid.

To the record, and errors assigned, we respectfully direct the attention of the court.

POINTS.

I.

It would seem from the positions assumed in the demurrer that appellees' counsel seemed to be laboring under the hallucination that a bill of review must set out

specifically all of the complainant's interest in the subject matter of the suit, in the same manner as an original bill, only with greater technical accuracy. In this view, of course, appellees' counsel is mistaken.

A bill of review is brought, not so much to enforce existing rights, or to recover existing interests, as to correct errors apparent in the record. It is more like a writ of error, with errors assigned on the record, than an original bill in chancery.

Griggs v. *Gear*, 3 Gilm., 2.

McDaniel v. *James*, 23 Ill., 408.

Levin v. *Magim*, 49 Ill., 67.

A bill of review may be brought for error of law apparent on the record, or for newly-discovered matter arising after the entry of the decree, or both.

Judson v. *Stephens*, 75 Ill., 255.

In this case the bill is brought, first, to review and reverse the decree for error apparent in the record; second, for newly-discovered matter that was unknown, and not only unknown, but which had not occurred at the time that the decree was entered.

The bill is prepared according to the strict rules of equity practice; it contains the proceedings in the former case, copies of the bill, answer, decree, and other proceedings in the original case; also the new matter discovered, with errors assigned, and the grounds on which the original decree is sought to be impeached.

Gardner v. *Emerson*, 40 Ill., 296.

Goodrich v. *Thompson*, 88 Ill., 286.

Story's Eq. Pl., sec. 120.

Dougherty v. *Morgan*, 6 Mon., 151.

It is also proper practice to exhibit a bill of review on questions of fact solely, *for instance*, to impeach a decree on the grounds of fraud, and in this case a glaring legal fraud has been committed.

Boyden v. *Reed*, 55 Ill., 458.

Appellees' counsel assumes that there are no errors of law assigned in the bill, and that the errors assigned are mere errors of fact. A glance at the assignments of error on the face of the bill will explode the counsel's theory in that direction.

However, we admit that it is frequently a very difficult matter to draw a clear or definite line of distinction between errors of law and errors of fact. In some cases errors of law are sharply defined, in others errors of fact just as sharply, while some partake of the nature of both, and are effectually both, or either.

And in chancery an *iron rule* cannot be maintained, as the practice must be more or less flexible (although always certain) to maintain the principles of equity.

Of course to have an error of law there must necessarily be first an error of fact to create it. Law being simply "a rule of action," must operate on facts, and be applied to circumstances, and the facts so operated on by rules of law develop legal errors, so that errors of fact are the real progenitors of errors of law, in other words, of legal errors. While it is true that the bill must show errors of law, still when errors of law are assigned, errors of fact may be assigned also, and all the errors will be examined by the court in furtherance of justice, it being a question more as to the equity of the complainant's case, as shown by the record, than to employing technical rules to defeat it.

The rule is this, "that upon a bill of review, the court will review and reverse its own decree *for an erroneous application of the law to the facts found*," whenever a court of appeals would do so for the same cause.

Evans v. *Clemment*, 14 Ill., 206.

Moore v. *Bracken*, 27 Ill., 23.

This is the correct practice, to reverse "for an erroneous application of the law to the facts found," the same as a court of law would on error or appeal. And following the annalogy as to the practice of the two courts, the rule is well settled that "upon error to the Circuit Court, the entire record is brought up and is open to a revision by the Supreme Court."

Scott v. *Stanford*, 11 How., 394.

Bank of U. S. v. *Smith*, 11 Wheat., 171.

Viner's Abg., vol. 10, p. 24, sec. 2 (error 6).

Sweeney v. *People*, 28 Ill., 208.

This doctrine and practice is well settled. Then, following the analogy, in appellate courts "a general assignment of error is sufficient" (although others and special and particular ones are not assigned), if error appears in the record, to reverse the decree or judgment.

Shepard v. *Merrill*, 13 Johns, 475.

C. & R. I. R. R. Co. v. *Coal Co.*, 36 Ill., 32.

Shaw v. *People*, 81 Ill., 150.

And the court is at liberty to reverse when the record

discloses a fatal defect in the proceedings, when the same has not been assigned for error.

Ives v. *Finch*, 28 Conn., 114.

Crandall v. *State*, 10 Conn.

The State v. *Bank of La.*, 5 La., 341.

Baird v. *Mattox*, 1 Call, 240, 275.

Now when this is the law, and the course and practice of the Appellate Courts, and we remember the maxim, as old as the Chancery Court, and as time-honored as equity, that "equity follows the law," the court can have very little difficulty with the assignments of error in this record, and we cannot conceive of any state of circumstances that would render them obnoxious to a demurrer, and the court will remember that no specific error is pointed out, and no specific assignment of error in the bill is attacked by the appellees' demurrer, although it purports to be interposed as a special as well as general demurrer.

II.

The appellees by their demurrer admit all the material allegations of the bill, and every averment of fact properly pleaded, and in their demurrer they take no exception to the form or manner of stating the facts, or assignments of error. Their demurrer goes simply to the substance, and they say to the appellants, The allegations of your bill are all true; your assignments of error are well taken, but your facts, although admitted, do not entitle you to relief, or give you any standing in a court of equity. They admit that the proceedings in the case sought to be reviewed show:

1. That the mortgage indebtedness at the time of

the entry of the decree did not exceed $4,000, and that the amount of the decree, $12,667.25, is unjust, oppressive, inequitable, and exorbitant.

2. That the decree is inconsistent with and contrary to the evidence in the case.

3. That the decree is usurious, and gives $5,000 of usurious interest to the appelles.

4. That the decree is unjustly oppressive in arbitrarily providing that the appellants' homestead should first be sold (contrary to the statute), and that the lands of Elizabeth Blue mentioned in the decree should not be sold for more than $4,000, thereby compelling a sale of appellants' homestead for $8,667.25 and the costs of sale.

5. That the decree does not settle or determine the rights or interests of any of the defendants except Elizabeth Blue and appellants.

6. That the decree has only been entered against a part of the defendants, leaving the suit still pending as to others.

Or. Rec. pp. 28, 29. Pr. Rec. p. 12.

The demurrer further admits that the sale by the master in chancery was a fraud in law: *that he advertised the premises for sale at the south front door of the court house; that he failed to sell the premises at that place, but sold them at a different place, at the north door (the back door), of the court house, a place not advertised and not frequented by people, and that in consequence of such fraud there were no bidders except the plaintiff's agent, who bid in the premises at complainant's own price.*

Or. Rec. 30. Pr. Rec. 13.

The appellees have not only admitted this by their

demurrer, but they have brought into court here the most absolute and overwhelming proof of the fact in their (additional) record filed by them in this case, in the affidavits of Hanson, Neifing, Shelton, O. H. Blue, E. Blue, and Bond, all of whom testify unqualifiedly to the fraudulent sale.

Add. Rec. pp. 1–11. Pr. Add. Rec. pp. 1–5.

III.

In the court below, on the hearing of the demurrer, appellees insisted "that the court could not examine any of the proceedings in the case except the decree; that if legal errors did not appear on the face of the decree, then the bill must be dismissed." At the same time they insisted, with an inconsistency amounting to absurdity, that appellees had a right to make an issue of fact on their demurrer by offering in evidence the certificate of evidence in the original case, showing the discharge in bankruptcy of one of the appellants, which crude and absurd positions the court below sustained, and allowed the appellees to offer their proofs on the issue of fact conjured up in their hermophodite nondescript, misnamed by them a demurrer, but used by them as a plea. See their demurrer, Or. Rec. p. 45, Pr. Rec. p. 19, and the certificate of evidence, which is the additional record filed by appellees, and the discharge in bankruptcy appearing in Add. Rec. p. 29, and in Pr. Add. Rec. p. 11.

The position assumed by appellees, that the decree must show error on its face to give the court jurisdiction to entertain a bill of review, would be in the courts of the United States an absurdity, while in England it is the rule, because in England the decree always contains a special statement of the material facts found by the court which

supports the decree, and it also embodies the substance of the bill, answer, and other pleadings; hence the errors, if there are any, appear on the face of the decree. In the courts of this country the decree does not contain the evidence in the case, nor any part of it, nor does it set forth the bill, answer, or any of the pleadings. Consequently, in this country, it is absolutely necessary to examine the bill, answer, and all the proceedings in the record, including the evidence, in order to examine all errors of law; for in our practice it is only by a comparison of the decree with the other portions of the record that errors of law can be discovered, or the correctness of the decree ascertained.

Story's Eq. Pl., § 407.

Dexter v. *Arnold*, 5 Mason, 311, 312.

Combs v. *Proud*, 1 Ch. Cas., 54.

Webb v. *Pell*, 3 Paige Ch. Rep., 368.

Wyatt Pr. Reg., 98.

In the American courts, where the English practice of reciting the proceedings in the decree does not prevail, the proceedings in the case are always the subject matter of revision in a bill of review, to the same extent and in the same manner as if they were stated on the face of the decree in conformity with the English practice.

Tomlinson v. *McKaig*, 5 Gilm., 258.

IV.

This sublime document, named a demurrer by appellees, contains the following intelligent and astounding averment: "Because it appears by the record and certificate of evidence, made a part of the bill of review, that complainant, Charles E. Shelton, was discharged in bank-

ruptcy at and before the sale of the mortgaged property under the decree of sale, and hath no interest in the subject matter of this litigation." This is judicial knowledge worthy of the gods; utterly astonishing and beyond ordinary judicial comprehension. These appellees, out here in a remote corner of suckerdom, have made the all-important legal discovery, hitherto wholly unknown, that a discharge in bankruptcy of a debtor from the burden of his debts works a legal and absolute confiscation of a vested estate. And they insist on applying their yet unpatented discovery to this case, and insist that when Charles E. Shelton was discharged by the bankrupt court from his indebtedness, he was by the same act discharged and forever ejected from his homestead, and has, therefore, "no interest in the subject matter of this litigation;" *a most important discovery indeed!*

Shelton and wife, in their answer to the original bill, allege "that the additional real estate security given by said Charles E. Shelton to secure said notes was and is the farm and homestead of these defendants; that said Charles E. Shelton is the head of a family, and a householder, and at present residing with his family on said farm in said homestead."

Or. Rec. p. 18, Pr. Rec. p. 8.

This answer of the appellants is incorporated in and a part of the bill of review, and the fact admitted by the appellees' demurrer, and after knowing the fact, and admitting the fact, of Charles E. Shelton's homestead rights in the premises in controversy, these astute appellees have persuaded a very able district judge (sitting in the Circuit Court) to overrule the law, contradict the record, and ignore common decency, by sustaining a demurrer on a

point admitted by them to be a lie and a fraudulent contrivance to deceive a usually discriminating judicial officer.

The discharge in bankruptcy discharged Mr. Shelton from his indebtedness, but certainly it did not discharge him from his homestead, or abrogate his rights therein. On the contrary, his homestead rights are specially protected by the Bankrupt Act. By that act the homestead of the bankrupt (and all property exempted from execution and forced sale by the laws of the state in which the bankrupt is domiciled) is expressly and positively reserved to him. That act, provides that "such property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale on execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state as existing in the year 1871," etc.

U. S. Stat. at Large, 1875, § 5045.

"As these provisions are founded upon the humane policy of providing means for the support of the poor man and his family, they are to be liberally rather than strictly construed. They should receive such fair construction as will best promote the beneficent intention of Congress."

Bump's Bankruptcy, 10th Ed., p. 153.

The statute of the State of Illinois in relation to the exemption of homesteads provides, "that every householder having a family shall be entitled to an estate of homestead, to the extent of $1,000, in the farm or lot of

land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts or other purposes, and from the laws of conveyance, descent, and devise," etc.

Chap. 52, § 1, page 483, Rev. Stat., 1877.

Had it been true to all intents and purposes that the appellant, Charles E. Shelton, could not maintain his bill in consequence of having been discharged in bankruptcy from the payment of his indebtedness, surely no such circumstance had intervened as to the other appellant, Roxanna Shelton. She had not been discharged in bankruptcy, *either from her debts or her homestead, nor had her homestead estate in the mortgaged premises been confiscated by any such discharge*, and to sustain the demurrer as to her on the insane delusion that she had no interest in the subject matter of the suit was worse than ridiculous.

Shelton, instead of being dispossessed of his homestead by his discharge in bankruptcy, was, on the contrary, protected in his possession and right of homestead by the very act to which he owed his discharge. So that, in sustaining the appellees' demurrer on the ground of Shelton's discharge from his indebtedness, it is very evident that "somebody blundered."

V.

In what manner, or how, the new matter set up in the bill in this case could be obnoxious to a demurrer, no ordinary judicial mind can discover (however, we were not dealing with ordinary judicial minds in the court be-

low). To admit the facts alleged is simply to sustain the bill.

The fraudulent sale of the premises, and consequent injury to the appellants, is fully admitted by the appellees in their demurrer, and we insist that the sustaining of the demurrer to that portion of the bill was an error bordering upon the insane. It was an outrage upon every sense of justice, on law, equity, and common sense. Under no possible circumstances could the new matter set up have been obnoxious to a demurrer.

Welf. Eq. Pl., 243.

Milf. Eq. Pl., 204.

We are not without precedent in this case. A case almost similar (only that the fact was not admitted by demurrer, as in this case) has received a judicial determination in this state. In McConnell *v.* Gibson, a mortgage was foreclosed, a commissioner was appointed to sell the mortgaged property, who sold it, reported the sale to the court, which approved the report and confirmed the sale. Afterwards a bill of review was filed, setting up the fact that a third person had purchased the property from the commissioner at the sale, and that the property was purchased for the commissioner himself, and praying that the case be reviewed, the order of the court confirming the commissioner's report be vacated, and the sale set aside. The court held that the sale was a fraud in law, that the bill came precisely within the definition of an original bill, in the nature of a bill of review, as laid down in Grigg *v.* Gear, 3 Gilm., 2, and in Story's Eq. Pl., § 426, and that it could be filed as a matter of right.

McConnell v. *Gibson*, 12 Ill., 128.

In our judgment, this case of McConnell *v.* Gibson

is conclusive on the question of the new matter alleged in the bill in the case at bar.

Therefore, upon the record, the errors assigned, the points suggested, and authorities cited, we submit this cause to the determination of this honorable court, confidently hoping that the decree of the Circuit Court may be in all things reversed, and the cause remanded with proper directions to the court below.

LEWIS E. PAYSON,
CHARLES J. BEATTIE,
Attorneys for Appellants.

ackowledging all or any of the matters and things in the said bill of
44 complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows:

First. That by the constant rules of this court no bill of review ought to be admitted to alter or change matters decreed, only for error in law appearing in the body of the pleadings and decree as drawn and entered, and for new matter arising since the decree, or such matter of which the complainants could not have notice at the time of the decree; but these defendants are and each of them is advised that the matters assigned by the said bill of review for cause of reversal of the said decree, as the same thereby appears by the complainant's bill, are neither any error in law apparent in the body of the decree and the pleadings, nor any such new matter as aforesaid.

Second. That all and singular the matters and things complained of in said bill of complaint which arose before the entry of said final decree in said cause were questions of fact heard and determined by the court in and by the final decree. And as to said matters and things complained of as having occurred after the entry of said final decree, the same cannot, nor can the determination of said questions of fact had by the court at and before the said final decree, be the subject of a bill of review, as they are advised by counsel.

45 Third. Because it appears by the record in said cause that complainant Charles E. Shelton was discharged in bankruptcy at and before the sale of the mortgaged property under the decree of sale in said cause, and hath no interest in the subject-matter of this litigation, and the complainants do not show such an interest as will entitle them to bring said amended bill of review. Wherefore and for divers other good causes of demurrer appearing in the said amended bill of review, these defendants demur to the said bill, and to all of the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed, with their reasonable cost in this behalf sustained.

EDGAR M. VAN KLEECK,
ANDREW S. McMILLAN,
THOMAS H. THOMPSON,
GEORGE BENNETT, AND
JOHN ANDRIM,
By JOHN I. BENNETT,
Their Solicitor.

JOHN I. BENNETT,
Of Counsel.

I herby certify that, in my opinion, the foregoing demurrer of Edgar M. Van Kleeck, Andrew S. McMillan, Thomas H. Thompson, George Bennett, and John Andrim, defendants, to the amended bill of review
46 of Charles E. and Roxanna Shelton, complainants, is well founded in law, and proper to be filed in the above cause.

JOHN I. BENNETT,
Sol. for said Defe't.

STATE OF ILLINOIS,
Cook County, ss:

John I. Bennett being sworn, says that he is a solicitor for said defendants, for whom he has above demurred, that his clients are all non-residents of said Cook County, and therefore he makes this affidavit & says that said demurrer is not interposed for the purpose of delaying said suit, or any proceedings therein.

JOHN I. BENNETT.

Subscribed and sworn to before me this 17th day of December, A. D. 1881.

FRANK I. BENNETT, [SEAL.]
Notary Public.

(Endorsed:) Filed Dec. 17, 1881. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the same day, to wit, the seventeenth day, of December, in said October adjourned term, A. D. 1881, of said court, in the record of the proceedings thereof in chancery, before Hon. Henry W. Blodgett, judge, appears the following entry in said entitled cause, to wit:

47 CHARLES E. SHELTON AND ROXANA Shelton
vs.
EDGAR M. VAN KLEECK, ANDREW S. McMILLAN, Thomas H. Thompson, George Bennett, John Andrim, Gerhard Foreman, Elias Greenebaum, Elizabeth Blue, James E. Morrow, Martha Secor, A. F. Fisher, Wm. M. McGregor, Peter Terwilliger, and Moses Rose. } In chancery. Bill of review.

The demurrer of defendants this day filed herein to the bill as amended in this cause is now submitted to the court by defendants' solicitor. And the court, after duly considering the same and being now fully advised in the premises, sustains said demurrer and orders that said bill of review be dismissed for want of equity at complainants' costs.

It is thereupon considered, adjudged, and decreed by the court that the bill of review herein be dismissed, and that the defendants herein do have and recover of the complainants therein their costs and charges by them about their defense in this behalf expended, amounting to the sum of thirty-nine dollars and five cents, and that execution issue herein therefor.

And thereupon said complainants, by their solicitor, pray an appeal herein to the Supreme Court of the United States, which said ap-
48 peal is allowed by the court upon their giving bond herein in the penal sum of five hundred dollars within sixty days, with security, to be approved by the court.

Afterwards, to wit, on the ninth day of February, A. D. 1882, came said complainants, by their solicitor, and filed in said clerk's office an appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents, that we, Charles E. Sh[illegible] Shelton, and Jefferson P. Houston [illegible] County, in the county [illegible]

firmly bound unto Edgar M. Van Kleeck, Andrew S. McMillan, George Bennett, John Antrim, and Thomas Thompson, of , in the county of , and State of , in the sum of two thousand dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 13th day of January, A. D. 1882.

The condition of the above obligation is such that whereas the said Edgar M. Van Kleeck, Andrew S. McMillan, George Bennett, John Antrim, and Thomas Thompson, did, on the 17th day of December,
49 A. D. 1881, in the circuit court of the United States in and for the northern district of Illinois, recover a judgment against the above-bounden Charles E. Shelton and Roxanna Shelton, to wit, that a demurrer was sustained by said court to the bill of complaint in said cause, and said bill dismissed, and a judgment rendered for the costs of said suit against Charles E. Shelton and Roxanna Shelton, from which order of said court sustaining said demurrer and dismissing said bill and said judgment for costs, the said Charles E. Shelton and Roxanna Shelton have prayed for and obtained an appeal to the Supreme Court ofthe United States of America:

Now, therefore, if the said Charles E. Shelton and Roxanna Shelton shall prosecute their appeal with effect, and if they fail to make their plea good, shall answer all damages and costs, then this obligation to be void; otherwise to remain in full force and effect.

ROXANA SHELTON. [SEAL.]
CHARLES E. SHELTON. [SEAL.]
J. P. HOUSTON. [SEAL.]
BENJ. F. BURT. [SEAL.]

Signed, sealed, and delivered by J. P. Houston, in presence of—
E. A. DRUMMOND,
Deputy Clerk.

Signed, sealed, and delivered by Benjamin F. Burt, in presence of—
E. A. DRUMMOND,
Deputy Clerk.

50 STATE OF ILLINOIS,
Livingston County, ss:

I, John W. Woodrow, a notary public in and for said county, do hereby certify that on this day the within named obligors duly appeared before me at my office in Pontiac, in said county, each being well known to me as Charles E. Shelton and Roxana Shelton, and known to me to be the identical persons of that name, whose names are signed to said bond, and each severally acknowledged that they had signed, sealed, and delivered said bond, that they knew its contents, and that it was their act and deed, at this date.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this day of February, A. D. 1882.

[NOTARIAL SEAL.] JOHN W. WOODROW,
Notary Public.

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Feb'y 9, 1882. Wm. H. Bradley, clerk.

51 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct and complete transcript from the records of said court of the following files and record entries therein, to wit: the bill of review, the order allowing same to be filed, the subpœna with return thereon, the demurrer filed October 21st, A. D. 1881, the order of court thereon, the amended bill, the demurrer to same filed December 17th, A. D. 1881, the order sustaining same and dismissing bill, and allowance of appeal, and the appeal bond, as the same appears of record and on file, the originals of which now remain in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago in said district this 18th day of February, A. D. 1882.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 888. Charles E. Shelton and Roxanna Shelton, appellants, vs. Edgar M. Van Kleeck, Andrew S. McMillan, et al. N. Illinois C. C. U. S. Filed 31st July, 1882.

16-532

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 888.

CHARLES E. SHELTON AND ROXANNA SHELTON, APPELLANTS,

vs.

EDGAR M. VAN KLEECK, ANDREW S. MILLAN ET AL.

FILED OCTOBER 24, 1882.

SUPREME COURT OF THE UNITED STATES.

No. 888.

CHARLES E. SHELTON AND ROXANNA SHELTON, APPELLANTS.

vs.

EDGAR M. VAN KLEECK, ANDREW S. MILLAN ET AL.

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1 CERTIFICATE OF EVIDENCE.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof, December term, A. D. 1880. In chancery.

E. M. VAN KLEECK
vs.
CHAS. E. SHELTON, ROXANA SHELTON, ANDREW S. McMILLAN, et al.
} Motion to set aside master's sale.

Be it remembered that on the hearing of the motion to set aside the master's sale of real estate in said cause at said term, the said defendants, to maintain the issue on their part, offered in evidence and read the six following affidavits:

Affidavit of Z. Hanson.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof. In chancery.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON ET AL.

2 Zackarias Hanson, of said county, being first duly sworn, on his oath says that he was present at the south door of the court-house in Pontiac on the 30' Sept., 1879, at the sale of the real estate involved in this suit, and saw the master in chancery, Henry W. Bishop, make such sale, and at the time the sale was made it was after two p. m., and affiant believes it was nearly or quite three o'clock p. m.; that there was but very few persons present at such sale, not to exceed ten persons in all, and no bidder attended except John W. Woodrow.

ZACHARIAS HANSON.

Subscribed & sworn before me this 3d Janu'y, 1881.
R. R. WALLACE,
County Judge.

Affidavit of John Neifing.

UNITED STATES OF AMERICA,
Northern District of Illinois,

In the circuit court thereof.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON.

John Neifing, of the county of Livingston, in the State aforesaid,

3 being first duly sworn, on his oath says that on September 30, 1879, he attended at the sale of real estate made by Henry Bishop, of Chicago, at the south door of the court-house in Pontiac, in said county; that the sale did not take place, as affiant believes, until after three o'clock p. m. of that day; that affiant saw one of the bystanders take out his watch, and when inquired of by affiant as to the time of day, said bystander replied that it was 20 minutes past three o'clock, and affiant believes it was as late as the time announced; that at this time there was but very few persons present.

JOHN NEIFING.

Subscribed and sworn before me this 4th day of January, 1881.

[SEAL.] A. W. COWAN,
Notary Public in & for Livingston Co., Ills.

4 *Affidavit of Charles E. Shelton.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof. In chancery.

E. M. VAN KLEECK
vs.
CHAS. E. SHELTON ET AL.

Charles E. Shelton, a defendant in the above-entitled cause, being first duly sworn, declares and says on oath that the master in chancery of said court, Mr. Henry W. Bishop, advertised the real estate of affiant to be sold, in pursuance of the decree in said cause, on the 30th day of September, A. D. 1879, at the hour of one o'clock p. m., at the south front door of the court-house, in the city of Pontiac, in Livingston County, Illinois, as will more fully appear from the advertisement of sale, which is hereunto attached marked A; that affiant went to the south front door of said court-house, in Pontiac aforesaid, about 15 minutes before one o'clock p. m., on said day, for the purpose of being present at said sale; that affiant then found several persons at said south front door of said court-house,
5 who were waiting for the sale to take place; that some of the persons waiting there said they had come to purchase said real estate, and to bid for the same; that affiant and said persons waited at said south front door from that time until about 15 minutes after two o'clock on said day, and that during that time said master did not sell, or attempt to sell, said real estate at said south front door of said court-house; that affiant and said persons then went away from said south front door, and affiant avers that about three o'clock, or a few minutes after three o'clock, on said day, the said master in chancery came to said south front door of said court-house, after all the bidders had gone away, and offered said real estate for sale, and sold the same to the agent of the said plaintiff or complainant, and that said sale was not made until about five or ten minutes after 3 o'clock p. m. of said day, nor commenced before that time. Affiant further avers that said master in chancery made a mistake in the place of sale in the first instance, and first called said sale at the north front door of

6 said court-house, and sold the same there; that he afterwards discovered his mistake and sold the same again at the south front door, as aforesaid.

C. E. SHELTON,

Subscribed and sworn to before me this 22nd day of December, 1880.

[SEAL.] A. W. COWAN,
Notary Public in and for Livingston County, Ill.

Affidavit of Oliver H. Blue.

THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof. In chancery.

E. M. VAN KLEECK
vs.
CHAS. E. SHELTON ET AL.

Oliver H. Blue, being first duly sworn, declares and says on oath that affiant is a resident of the county of Livingston, in the State of Illinois; that on Tuesday, the 30th day of September, A. D. 1879, affiant was in the city of Pontiac, in said county, and having learned that there was to be a sale of the real estate of the defendant Shelton, by Mr. Bishop, the master in chancery of said court, at the south front door of the
7 court-house, in Pontiac, at one o'clock p. m. of said day, affiant went to the south front door of the court house, in said city, about five minutes before one o'clock p. m. of that day, expecting to witness or see said real estate sold by said master in chancery; and affiant avers that he remained at said south front door of said court-house from about five minutes before one o'clock p. m., as aforesaid, until about fifteen minutes past two o'clock p. m. of said day, and that during the time aforesaid the said master in chancery did not offer for sale or sell or attempt to sell said real estate; that about three o'clock or a short time afterwards on said day affiant saw some persons standing in front of the court-house, at the south front door thereof, and affiant again went there to see what was going on, and the master in chancery was then commencing to sell said real estate; that affiant then looked at his wat'h and found that it was then ten minutes past three o'clock.

OLIVER H. BLUE.

8 Subscribed and sworn to before me this 22nd day of December, 1880.

[SEAL.] A. W. COWAN,
Notary Public in & for Livingston Co., Ill.

Affidavit of Samuel Bond.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON.

Samuel Bond, of Livingston County, Illinois, being first duly sworn, on his oath says that he is a resident of said county, and knows the real estate advertised to be sold by Henry W. Bishop, the master in chancery of the U. S. court, in Cook County, Illinois, and has frequently seen the advertisement of said sale and the land described therein and involved in the above-entitled cause; that said sale thereof was advertised to take place on the 30th Sept., 1879; that affiant was present at one o'clock p. m. of that day, at the south door of the court-house, in Pontiac,
9 for the purpose of attending said sale there advertised to take place, and remained there until half-past two o'clock or later, and that many others were present with affiant, and some of them there declared that they were there for the purpose of bidding at such sale when the same should take place; that while affiant was there no sale took place; that affiant then left said place of sale & went out into town, and remained somewhere about a half hour and returned to the court-house; and on affiant's return he saw the said Bishop, and as he approached the south door through the hall of the building heard said Bishop say that he guessed he must have made a mistake in the place where said sale was advertised to take place.

That at about three p. m. of that day said Bishop did offer for sale & did sell said premises, or the same were struck off, to one J. W. Woodrow; that when said sale did take place a large proportion of the intended bidders or persons attending said place of sale at one o'clock p. m. had gone 'way & did not return & were not present when the sale did actually take place.

SAMUEL H. BOND.

10 Subscribed & sworn before me this 24th Dec., 1880.
[SEAL.] ZEPH. WINTERS, *Clerk.*

Affidavit of Elizabeth Blue.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON.

Elizabeth Blue, being first duly sworn, on oath says that she is a resi-

dent of Livingston County, in the State aforesaid; that she knows the real estate advertised to be sold by Henry W. Bishop, master in chancery of the U. S. court in Cook County, Illinois, and has frequently seen the advertisement thereof purporting to have been made by him and to take place in pursuance of the decree of said court; that on the 30th day of September, 1879, affiant was present, and at one o'clock p. m. of that day, at the south front door of the court-house in Pontiac, Illinois, for the purpose of attending said sale there advertised to take place, and re-
11 mained at said door until after two o'clock p. m., and that many others were there at the same time, some with the avowed purpose of bidding upon the property when the same should be offered for sale; that until after two o'clock, and while affiant remained, no sale took place; that affiant then went out into town, and while so in town affiant heard from some person that a sale was still to take place at said south door; affiant then returned to said south door, where she found said Bishop; and affiant did then and there hear said Bishop say that he (Bishop) had made a mistake in selling the property at the north door instead of at the south door, where the same was advertised to take place.

Affiant says that about three o'clock p. m. of said 30th September, 1879, and after a large proportion of the intended bidders at such sale had retired, supposing said sale was not to take place, the said Bishop proceeded to again sell the premises described in said decree.

ELIZABETH + BLUE.

Subscribed & sworn before me this 22d Dec., 1880.

[SEAL.] A. W. COWAN,

Notary Public in & for Livingston County, Ill.

12 Said defendants also offered in evidence and read the notice of sale published by the master in chancery as follows, to wit:

(See page 22 of this record.)

The complainant, to maintain the issue on his part, offered in evidence and read the master's report of said sale, to wit:

Master's report of sale.

In the circuit court of the United States for the northern district of Illinois. In chancery.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON, ROXANNA SHELTON, Elizabeth Blue, Andrew S. McMillan, Gerhard Foreman, Elias Greenebaum, James E. Morrow, Martha Secor, A. F. Fisher, Julius Rosenberger, Moses Rose, and Peter Terwilliger. } Master's report of sale.

To the honorable the judges of the said court:

13 The undersigned, Henry W. Bishop, as master in chancery of the said court, respectfully reports that it was in a decree of the said court entered herein on the 28th day of July, A. D. 1879, among other things, ordered, adjudged, and decreed that the said defendant

Charles E. Shelton, or some of the other defendants in this cause, pay, or cause to be paid, to the complainant, within ten days from the date of the entry of the said decree, the sum of twelve thousand six hundred and sixty-seven dollars and twenty-five cents, with interest thereon at the rate of six per centum per annum from the date of the entry of the said decree to the day of such payment, and also pay into court the costs in this cause to be taxed, and in default of so doing that all and singular the premises mentioned and described in the bill of complaint and thereinafter and hereinafter described, or so much thereof as might be sufficient to satisfy the amount due the complainant as thereinbefore adjudged, together with interest and the costs in this case, and which might be sold separately without material injury to the parties interested, be sold at public
14 auction to the highest bidder, for cash, by Henry W. Bishop, master in chancery of this court; and it was further ordered that he make such sale at the south front door of the court-house in Pontiac, in the county of Livingston, and State of Illinois, and that he give public notice of the time & place of holding such sale by publishing an advertisement thereof once a week for three successive weeks in a newspaper published in Pontiac, in the county of Livingston, and State of Illinois, the first publication of such notice being not less than twenty-one days previous to the time of such sale; that at such sale the complainant, or any of the parties to this cause, might be the purchaser or purchasers; that the said master should give to any purchaser at such sale a certificate of sale in pursuance of the law of the State of Illinois concerning the sale of real estate by virtue of a decree of foreclosure of mortgage, and should cause a duplicate of such certificate to be recorded as required by law.

That in accordance with said decree, said defendants having made
15 default in the payment of the moneys in said decree mentioned within said period of ten days, and the same remaining wholly unpaid, the undersigned, in accordance with the said decree, as such master in chancery, advertised said premises and property for sale at public auction to the highest bidder, for cash in hand, in the Pontiac Sentinel, a weekly newspaper of general circulation printed and published in the city of Pontiac, in the county of Livingston, and State of Illinois, the date of the first paper containing said advertisement being the third (3d) day of September, A. D. 1879, and the date of the last paper containing the same being the twenty-fourth (24th) day of September, A. D. 1879, said advertisement having been published in said paper four (4) successive weeks, to wit, four (4) times prior to day of sale, as appears by a certified copy of said advertisement and the certificate of publication thereof hereto attached and made a part hereof.

That in accordance with the said decree, and in pursuance of the order of the said court herein, and on the thirtieth (30th) day of
16 September, A. D. 1879, in Pontiac, in the county of Livingston, and State of Illinois; the undersigned, as such master in chancery, did offer the premises and property in said advertisement & decree mentioned & described as follows, to wit: All the certain lots, pieces, or parcels of land situate, lying, & being in the county of Livingston and State of Illinois, and described as being the west half (½) of the southwest (¼) of section one (1); the southeast quarter (¼) of section two (2); the southwest quarter (¼) of section ten (10); the undivided half (½) of the west

half of the southeast quarter (¼) of section ten (10), and the east half (½) of the southeast quarter of section ten (10), all of said lands being in township number twenty-eight (28) north, range number four (4) east of the third principal meridian in the said county of Livingston and State aforesaid, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, for sale at public auction to the highest and best bidder for cash in hand and as follows, to wit: The undersigned, as directed in the said decree, first offered for sale the west
17 half (½) of the southwest quarter (¼) of section one (1); the southeast quarter (¼) of section two (2), in the following manner, to wit: The undersigned first offered same for sale by the acre separately, then in separate tracts of forty acres and twenty acres and ten acres, and in any quantity less than the whole and as might be desired, and there being no bidders to either of said offers, the undersigned then offered the whole of said west half of the southwest quarter of section one and the southwest quarter of section two for sale together, and then & there struck off and sold the same to said complainant for the sum of sixty-three hundred dollars ($6,300), that sum being the highest & best sum bid for the same, and he being the highest and best bidder therefor; the undersigned (as directed in the said decree) then offered for sale the east half of the southeast quarter of section ten in the following manner, to wit: The undersigned first offered the same for sale by the acre separately, then in separate tracts of ten acres, and twenty acres, and forty acres, and sixty acres, and
18 and in any quantity less than the whole and as might be desired; and, there being no bidders to either of said offers, the undersigned then offered the whole of said east half of the southeast quarter of section ten for sale together, and then and there struck off and sold the same to said complainant for the sum of twenty-one hundred dollars ($2,100), that sum being the highest and best sum bid for the same, and he being the highest and best bidder therefor. The undersigned (as directed in the said decree) then offered for sale the southwest quarter of section ten and the undivided half of the west half of the southeast quarter of section ten (being the remainder of the premises & property hereinbefore firstly described) in the following manner, to wit: The undersigned first offered the same for sale by the acre separately, then in separate tracts of ten acres, forty acres, sixty acres, eighty acres, and in any quantity less than the whole and as might be desired; and, there being no bidders to either of said offers, the undersigned then offered the whole of the said southwest quarter of sec-
19 tion ten (being a portion of said lastly described premises), and no one bid for same offered in that way. The undersigned then offered for sale said southwest quarter of section ten and the undivided half of the west half of the southeast quarter of section ten together, and then and there struck off and sold the same to the said complainant for the sum of forty-one hundred & nineteen dollars and thirty-three cents ($4,119.33), that sum being the highest and best sum bid for the same, and he being the highest and best bidder therefor.

And, as provided for in said decree, said complainant (purchaser as aforesaid), by his solicitor, has only paid over to the undersigned, as such master in chancery, the sum of three hundred and forty-nine dollars and ninety cents, being the amount of the taxed costs herein, and has also paid the master's fees, commissions, and disbursements on said sale.

And the undersigned further reports that he has executed and delivered to said purchaser the certificates of sale directed in said decree to be executed, and has filed in the office of the recorder of deeds of said
20 Livingston County, Illinois, duplicates of such certificates, paying the fees for the record thereof.

A particular statement of the said sale is hereto annexed, made a part hereof, and marked Exhibit A.

All of which is respectfully submitted,

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated Chicago, October 8th, A. D. 1879.

EXHIBIT A.

1879.		
28th July.	Decree for the sum of.....	$12,667 25
30' September.	Interest thereon at 6 % from the date of decree.....	130 88
	Taxed costs.....	349 90
		$13,148 03
	Master's commissions on sale.....	187 78
	Certificate of sale.....	1 50
	Paid recording duplicates.....	2 55
	Paid advertising sale.....	10 00
	Expenses attending sale.....	6 75
	Report of sale.....	5 00
		$13,361 61
	Sold to complainant for.....	12,519 33
	Deficiency.....	$842 28

21 EXHIBIT B.

Amount for which the southwest quarter of section ten & the undivided half of the west half of the southeast quarter of section ten was directed to be sold not exceeding.....	$4,000
And interest thereon at the rate of 6 % from date of the master's report, to wit.....	119 33
Sold to complainant for.....	$4,119 33

Received of H. W. Bishop, master in chancery, the sum of three hundred & forty-nine dollars and ninety cents, being the amount of taxed costs herein.

WM. H. BRADLEY, *Clerk.*

Settled with H. W. Bishop, master in chancery, in accordance with above statement.

JOHN P. BENNETT,
Complainant's Solicitor.

22 *Notice of sale by the master.*

MASTER'S SALE.

UNITED STATES OF AMERICA:

In the circuit court of the United States for the northern district of Illinois. In chancery.

E. M. VAN KLEECK
vs.
CHARLES E. SHELTON, ROXANNA SHELTON, Elizabeth Blue, Andrew S. McMillan, Gerhard Foreman, Elias Greenebaum, James E. Morrow, Martha Secor, A. F. Fisher, Julius Rosenberger, Moses Rose, and Peter Terwilliger.

In pursuance of a decree of the said court entered in the above-entitled cause on the 28th day of July, A. D. 1879, I, Henry W. Bishop, master in chancery of the said court, will sell at public auction, to the highest and best bidder, for cash in hand, and in the manner directed in said decree, at the south front door of the court-house in Pontiac, in the county of Livingston and State of Illinois, on Tuesday, the 30th day of September, A. D. 1879, at one o'clock in the afternoon of the said last-named day, the premises and property in the said decree mentioned and described as follows, to wit:

23 All the certain lots, pieces, or parcels of land situate, lying, and being in the county of Livingston and State of Illinois, and described as being the west half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section one (1), the southeast quarter ($\frac{1}{4}$) of section two (2), the southwest quarter ($\frac{1}{4}$) of section ten (10), the undivided half ($\frac{1}{2}$) of the west half of the southeast quarter ($\frac{1}{4}$) of section ten (10), and the east half ($\frac{1}{2}$) of the southeast quarter of section ten (10), all of said lands being in township number twenty-eight (28) north, range number four (4) east of the third principal meridian, in the said county of Livingston and State aforesaid, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

JOHN P. BENNETT,
Complainant's Solicitor.

Dated Chicago, Sept. 3d, A. D. 1879.

STATE OF ILLINOIS,
Livingston County, ss:

I, Fred. L. Alles, publisher of the Pontiac Sentinel, a weekly public newspaper printed and published in Pontiac, in said county, hereby
24 certify that the advertisement hereto annexed relating to the matter of master's sale, E. M. Van Kleeck vs. C. E. Shelton et al., has

been published in said paper, in every copy and impression thereof, for four weeks successively of the issues commencing Sept. 3d, 1879, and ending Sept. 24, 1879, which are the dates of the first and last papers containing the same.

Given under my hand this 25' day of September, A. D. 1879.

FRED. L. ALLES, *Publisher.*

Printer's fees, $10.00.

(Endorsed:) Filed Oct. 10, 1879. W. H. Bradley, cl'k.

25 The complainant also offered a statement in writing of the facts appearing on the face of the records of this and the district court, and also stating that the defendant, Shelton, was present when the sale was made by the master, which statement in writing was admitted by counsel for the said defendant in open court, the said Charles E. Shelton being present and assenting to said statement in writing and admission in open court, and agreeing that the facts stated therein were true, and agreeing that the decree and records referred to in said statement in writing might be treated as evidence, the same as if offered and read.

STATEMENT.

Circuit court of the United States, northern district of Illinois. Dec. term, A. D. 1880. In chancery.

EDGAR M. VAN KLEECK
vs.
CHAS. E. SHELTON ET AL.

1. Bill filed Dec. 21, 1877.
2. Decree of sale, July 28, 1879.
3. Sale under decree, Sept. 30, 1879.
4. Assignee in bankruptcy, app't'd October 23, 1879.

26 In the district court of the United States for the northern district of Illinois.

IN THE MATTER OF
CHARLES E. SHELTON, BANKRUPT. } In bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

To S. P. AVERY, Esq., of Morris, in the county of Grundy and State of Illinois:

I do hereby certify to you that you were duly appointed assignee of the estate and effects of the above-named bankrupt, at the first meeting of creditors, on the 22nd day of October, A. D. 1879, subject to approval by the court, and I do further certify that no creditors were present or duly represented at said meeting, and that you are required forthwith to notify

the undersigned, a register in bankruptcy of the district aforesaid, of your acceptance or rejection of the said trust.

Dated at Morris, the 22nd day of October, A. D. 1879.

COLQ'N GRANT,
Register in Bankruptcy.

Approved:

H. W. BLODGETT,
District Judge.

To whom it may concern:

27 Be it known that I hereby signify my acceptance of the trust of assignee of the estate of the above-named bankrupt, this 23rd day of October, A. D. 1879.

S. P. AVERY,
Assignee.

(Endorsed:) Filed Jan. 29, 1880. Wm. H. Bradley, clerk.

28 5. *Discharge.—Issued May* 28, 1880.

29 District court of the United States, northern district of Illinois.

Whereas Charles E. Shelton, of Rook's Creek, in the county of Livingston, in said district, has been duly adjudged a bankrupt under the Revised Statutes of the United States, title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf; it is therefore ordered by the court that said Charles E. Shelton be forever discharged from all debts and claims which by said title are made provable against his estate, and which existed on the thirtieth day of August, A. D. eighteen hundred and seventy-eight, on which day the petition for adjudication was filed by him, Charles E. Shelton, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of said court, at Chicago, in the said district, this twenty-eighth day of May, A. D. eighteen hundred and eighty.

H. W. BLODGETT, *Judge.*
[SEAL.] WM. H. BRADLEY, *Clerk.*

30 6. Report of sale was made Oct., 1879, and was confirmed under 83d rule November, 1879, and was subsequently confirmed by special order.

31 Afterwards, to wit, on the fifteenth day of December, in the adjourned October term of said court, A. D. 1880, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

E. M. VAN KLEEK
vs.
CHARLES E. SHELTON, ROXANNA SHELTON, Elizabeth Blue, Andrew S. McMillan, Gerhard Foreman, Elias Greenebaum, James E. Morrow, Martha Secor, A. F. Fisher, Julius Rosenberger, Moses Rose, and Peter Terwilliger. } In chancery.

And now again comes the complainant, by his solicitor, John P. Bennett, and this cause comes on to be further heard upon the report
32 of sale by Henry W. Bishop, master in chancery, filed herein on the tenth day of October, A. D. 1879, and thereupon, on motion of said complainant's solicitor, no cause to the contrary having been shown, and said sale and the actings and doings in said report mentioned appearing to have been done in conformity to law and the order of this court, it is ordered and decreed that said report and sale and the aforesaid actings and doings of said master in chancery be, and they are, fully approved and confirmed.

And it appearing to the court from said report that the said master has, as required by said decree, paid into the court and taken the receipt of W. H. Bradley, esq., clerk therefor, and filed the same with his report, the sum of three hundred and forty-nine dollars and ninety cents, being the amount of the taxed costs in said cause, and that after deducting the same, together with the master's fees, commissions, and disbursements, there remains to be applied upon the amount due to said complainant under said decree the sum of eleven thousand nine hundred and fifty-five dollars and eighty-five cents, it is ordered that said clerk credit said last-mentioned sum
33 on said decree as paid to said complainant on the thirtieth day of September, A. D. 1879, and in satisfaction of the said decree.

7. When the sale was finally made, as reported, Chas. E. Shelton was present.

It is admitted that the above facts appear by the records in this and the district court, except as to the last, and that the latter is true.

(Endorsed:) Filed Jan. 12, 1881. W. H. Bradley, cl'k.

I certify that the above and foregoing is a correct statement of all the evidence offered on the hearing of said motion.

THOMAS DRUMMOND.

(Endorsed:) Filed Mc'h 5, 1881. W. H. Bradley, cl'k.

34 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the certificate of evidence on motion to set aside sale, together with the papers therein called for filed in said court March fifth, A. D. 1881, with the exception of the bill of complaint, decree of sale, and sale under decree in the cause wherein E.

M. Van Kleeck is the complainant and Charles E. Shelton, Roxanna Shelton, et al., are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this nineteenth day of October, A. D. 1882.

[SEAL.] WM. H. BDADLEY, *Clerk.*

35 It is stipulated and agreed by the parties in the above case that the foregoing shall be filed as a further transcript of the record in said cause, under and in pursuance of the stipulation heretofore filed with the clerk, and that said further transcript is to be read in connection with and immediately following the words "make a part of this bill of complaint for evidence herein," occurring on page 31 of original transcript now filed, and page 13 of the printed copy thereof, and we hereby consent that the court may enter the proper order in that behalf.

Oct. 20, 1882.

L. E. PAYSON AND
CHAS. J. BEATTEE,
Counsel for Appellants.
JOHN I. BENNETT,
Counsel for Appellees.

(Indorsement on cover:) Supreme Court U. S. 1882, October term. No. 888. Charles E. Shelton et al., appellants, vs. Edgar M. Van Kleeck et al. Stipulation of counsel and addition to record. Filed 24th October, 1882.

15-5-82

SUPREME COURT, U.S.
FILED
DEC 8 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 888.

October Term, A. D. 1882.

CHARLES E. SHELTON AND ROXANNA SHELTON,
Appellants.
vs.
EDGAR M. VAN KLEECK, ANDREW S. McMILLAN, et al.
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument of Appellants.

Lewis E. Payson, Charles J. Beattie,
Attorneys for Appellants.

CHICAGO:
Richards & Thayer, Printers, 201 Clark St.
1882.

Supreme Court of the United States.

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CHARLES E. SHELTON AND ROXANNA SHELTON,
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vs.
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Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument of Appellants.

May it please the Court:

The case at bar is an appeal prosecuted from a decretal order entered in the court below by the judge of the District Court, sitting in the Circuit Court, sustaining a demurrer to appellants' bill of review, and dismissing the bill.

The bill of review that the judge of the District Court dismissed so summarily was exhibited by appellants for a two-fold purpose: first, to reverse the former decree of the Circuit Court entered by the same judge, for

errors of law appearing on the face of the record in the case sought to be reviewed, and, second, on account of new matter which had arisen out of facts and circumstances which had occurred in certain proceedings in the case subsequent to the entry of the decree, and pertinent to the issue, which new matter was a breach of the decree by the master in chancery who was charged with its execution; who, instead of selling the premises judicially as directed in the decree, and in the manner directed, entirely ignored the directions in the decree, and made a fraudulent sale of the premises at a different time and different place from the time and place mentioned and directed in the decree.

In their bill appellants, having set out the pleadings and decree in full, assigned the following errors as appearing on the face of the record in the former case:

1. "That at the time of rendering said decree the indebtedness of your petitioners to said Edgar M. Van Kleeck did not exceed the sum of $4,000, and that the amount decreed, to-wit, $12,667.25, is unjust, oppressive, and inequitable."

2. "That the amount of said decree, to-wit, $12,667.25, is unjust and exorbitant and a great oppression on your petitioners."

3. "That said decree is not consistent with the evidence in the case, and is contrary thereto."

4. "That said decree is usurious, and grants and pronounces in favor of usurious interest, and gives usury and usurious interest to the complainant, and that a large amount of usury and usurious interest, to-wit, about $5,000, is duly incorporated in and forms part of the amount of said decree."

5. "That said decree unjustly and oppressively discriminates against your petitioners in this, that it arbitrarily provides for selling your petitioners' homestead first, thereby exposing their farm and home to sacrifice, and it also provides that the farm and homestead of Elizabeth Blue shall not be sold for more than $4,000, thereby arbitrarily compelling a sale of your petitioners' homestead for $8,667.25 and the costs of sale."

6. "That said decree does not determine the rights or interests of any of the defendants except your petitioners and said Elizabeth Blue."

7. "That said decree has only been entered against a part of the defendants, leaving the suit still pending as to other defendants."

8. "Said decree is contradictory and shows that the same defendants made default and answered the bill and defended at the same time."

9. "Said decree is against the law and utterly inequitable, and that there are divers other errors and imperfections in said decree."

Appellants then alleged the following new matter:

"Your petitioners further aver that since the entry of said decree as aforesaid your petitioners have discovered new matter of consequence in said cause, and charge the fact to be that the sale of said premises by the said master in chancery was and is wholly and utterly illegal and void, and that said master either fraudulently or negligently failed to sell said premises in pursuance of said decree, and that he did not sell said premises at the south front door of the court house in Pontiac, Illinois, as commanded in said decree, and that, on the contrary, he sold

said premises at the north front door of the court house in said Pontiac, in defiance of said decree."

"Your petitioners further show that said master in chancery advertised said premises for sale, to be sold by him at the south front door of the said court house, at the hour of one o'clock P. M., on the 30th day of September, A. D. 1879, and that he failed to sell said premises at said place, and that on the contrary he sold said premises at the north door of said court house, at a place not advertised, and not frequented by people, and that in consequence of such fraud or negligence there were no bidders at said sale, except the complainant's agent, Mr. John W. Woodrow, who bid in said premises for the plaintiff at said complainant's own price and on his own terms, to the injury and oppression of your petitioners."

"Your petitioners further aver that afterwards, and on the said 30th day of September, A. D. 1879, the said master in chancery attempted to make another sale of said premises, and after the hour of three o'clock P. M. he offered said premises again for sale at the south front door of said court house, and as the sale of said premises was not advertised to take place at that hour last mentioned, there were no bidders at said last-mentioned sale, or pretended sale, except the plaintiff Van Kleeck's said agent, who bid said premises in for the complainant at his own price and on his own terms."

"Your petitioners further aver that said operations of said master in regard to said sale prevented divers and sundry persons who desired to purchase said lands from being present at the sale or bidding on the same, thereby depreciating the price thereof and preventing competition among purchasers, and tended to the manifest injury and oppression of your petitioners."

To this bill appellees interposed the usual stereotyped demurrer, which was sustained by the district judge, and the bill dismissed; thereupon the appellants appealed, and for the purpose of reversing this order of the district judge this appeal is prosecuted.

Appellants have therefore brought up the record of the Circuit Court, and have assigned thereon the following errors:

1. The court below erred in permitting appellees to make an issue of fact on the hearing of the demurrer below.

2. The Circuit Court erred in permitting matters not in the bill, and *de hors* the record, to be introduced and proved on the hearing of the demurrer below.

3. The Circuit Court erred in sustaining defendants' demurrer to complainant's bill below.

4. The Circuit Court erred in dismissing complainant's bill.

5. The Circuit Court erred in rendering the decree aforesaid in manner and form as aforesaid.

6. And other errors apparent in the record and proceedings aforesaid.

To the record, and errors assigned, we respectfully direct the attention of the court.

POINTS.

I.

It would seem from the positions assumed in the demurrer that appellees' counsel seemed to be laboring under the hallucination that a bill of review must set out

specifically all of the complainant's interest in the subject matter of the suit, in the same manner as an original bill, only with greater technical accuracy. In this view, of course, appellees' counsel is mistaken.

A bill of review is brought, not so much to enforce existing rights, or to recover existing interests, as to correct errors apparent in the record. It is more like a writ of error, with errors assigned on the record, than an original bill in chancery.

Griggs v. *Gear*, 3 Gilm., 2.

McDaniel v. *James*, 23 Ill., 408.

Levin v. *Magim*, 49 Ill., 67.

A bill of review may be brought for error of law apparent on the record, or for newly-discovered matter arising after the entry of the decree, or both.

Judson v. *Stephens*, 75 Ill., 255.

In this case the bill is brought, first, to review and reverse the decree for error apparent in the record; second, for newly-discovered matter that was unknown, and not only unknown, but which had not occurred at the time that the decree was entered.

The bill is prepared according to the strict rules of equity practice; it contains the proceedings in the former case, copies of the bill, answer, decree, and other proceedings in the original case; also the new matter discovered, with errors assigned, and the grounds on which the original decree is sought to be impeached.

Gardner v. *Emerson*, 40 Ill., 296.

Goodrich v. *Thompson*, 88 Ill., 286.

Story's Eq. Pl., sec. 120.

Dougherty v. *Morgan*, 6 Mon., 151.

It is also proper practice to exhibit a bill of review on questions of fact solely, *for instance*, to impeach a decree on the grounds of fraud, and in this case a glaring legal fraud has been committed.

Boyden v. *Reed*, 55 Ill., 458.

Appellees' counsel assumes that there are no errors of law assigned in the bill, and that the errors assigned are mere errors of fact. A glance at the assignments of error on the face of the bill will explode the counsel's theory in that direction.

However, we admit that it is frequently a very difficult matter to draw a clear or definite line of distinction between errors of law and errors of fact. In some cases errors of law are sharply defined, in others errors of fact just as sharply, while some partake of the nature of both, and are effectually both, or either.

And in chancery an *iron rule* cannot be maintained, as the practice must be more or less flexible (although always certain) to maintain the principles of equity.

Of course to have an error of law there must necessarily be first an error of fact to create it. Law being simply "a rule of action," must operate on facts, and be applied to circumstances, and the facts so operated on by rules of law develop legal errors, so that errors of fact are the real progenitors of errors of law, in other words, of legal errors. While it is true that the bill must show errors of law, still when errors of law are assigned, errors of fact may be assigned also, and all the errors will be examined by the court in furtherance of justice, it being a question more as to the equity of the complainant's case, as shown by the record, than to employing technical rules to defeat it.

The rule is this, "that upon a bill of review, the court will review and reverse its own decree *for an erroneous application of the law to the facts found*," whenever a court of appeals would do so for the same cause.

Evans v. *Clemment*, 14 Ill., 206.

Moore v. *Bracken*, 27 Ill., 23.

This is the correct practice, to reverse "for an erroneous application of the law to the facts found," the same as a court of law would on error or appeal. And following the annalogy as to the practice of the two courts, the rule is well settled that "upon error to the Circuit Court, the entire record is brought up and is open to a revision by the Supreme Court."

Scott v. *Stanford*, 11 How., 394.

Bank of U. S. v. *Smith*, 11 Wheat., 171.

Viner's Abg., vol. 10, p. 24, sec. 2 (error 6).

Sweeney v. *People*, 28 Ill., 208.

This doctrine and practice is well settled. Then, following the analogy, in appellate courts "a general assignment of error is sufficient" (although others and special and particular ones are not assigned), if error appears in the record, to reverse the decree or judgment.

Shepard v. *Merrill*, 13 Johns, 475.

C. & R. I. R. R. Co. v. *Coal Co.*, 36 Ill., 32.

Shaw v. *People*, 81 Ill., 150.

And the court is at liberty to reverse when the record

discloses a fatal defect in the proceedings, when the same has not been assigned for error.

Ives v. *Finch*, 28 Conn., 114.

Crandall v. *State*, 10 Conn.

The State v. *Bank of La.*, 5 La., 341.

Baird v. *Mattox*, 1 Call, 240, 275.

Now when this is the law, and the course and practice of the Appellate Courts, and we remember the maxim, as old as the Chancery Court, and as time-honored as equity, that "equity follows the law," the court can have very little difficulty with the assignments of error in this record, and we cannot conceive of any state of circumstances that would render them obnoxious to a demurrer, and the court will remember that no specific error is pointed out, and no specific assignment of error in the bill is attacked by the appellees' demurrer, although it purports to be interposed as a special as well as general demurrer.

II.

The appellees by their demurrer admit all the material allegations of the bill, and every averment of fact properly pleaded, and in their demurrer they take no exception to the form or manner of stating the facts, or assignments of error. Their demurrer goes simply to the substance, and they say to the appellants, The allegations of your bill are all true; your assignments of error are well taken, but your facts, although admitted, do not entitle you to relief, or give you any standing in a court of equity. They admit that the proceedings in the case sought to be reviewed show:

1. That the mortgage indebtedness at the time of

the entry of the decree did not exceed $4,000, and that the amount of the decree, $12,667.25, is unjust, oppressive, inequitable, and exorbitant.

2. That the decree is inconsistent with and contrary to the evidence in the case.

3. That the decree is usurious, and gives $5,000 of usurious interest to the appelles.

4. That the decree is unjustly oppressive in arbitrarily providing that the appellants' homestead should first be sold (contrary to the statute), and that the lands of Elizabeth Blue mentioned in the decree should not be sold for more than $4,000, thereby compelling a sale of appellants' homestead for $8,667.25 and the costs of sale.

5. That the decree does not settle or determine the rights or interests of any of the defendants except Elizabeth Blue and appellants.

6. That the decree has only been entered against a part of the defendants, leaving the suit still pending as to others.

Or. Rec. pp. 28, 29. Pr. Rec. p. 12.

The demurrer further admits that the sale by the master in chancery was a fraud in law: *that he advertised the premises for sale at the south front door of the court house; that he failed to sell the premises at that place, but sold them at a different place, at the north door (the back door), of the court house, a place not advertised and not frequented by people, and that in consequence of such fraud there were no bidders except the plaintiff's agent, who bid in the premises at complainant's own price.*

Or. Rec. 30. Pr. Rec. 13.

The appellees have not only admitted this by their

demurrer, but they have brought into court here the most absolute and overwhelming proof of the fact in their (additional) record filed by them in this case, in the affidavits of Hanson, Neifing, Shelton, O. H. Blue, E. Blue, and Bond, all of whom testify unqualifiedly to the fraudulent sale.

Add. Rec. pp. 1–11. Pr. Add. Rec. pp. 1–5.

III.

In the court below, on the hearing of the demurrer, appellees insisted "that the court could not examine any of the proceedings in the case except the decree; that if legal errors did not appear on the face of the decree, then the bill must be dismissed." At the same time they insisted, with an inconsistency amounting to absurdity, that appellees had a right to make an issue of fact on their demurrer by offering in evidence the certificate of evidence in the original case, showing the discharge in bankruptcy of one of the appellants, which crude and absurd positions the court below sustained, and allowed the appellees to offer their proofs on the issue of fact conjured up in their hermophodite nondescript, misnamed by them a demurrer, but used by them as a plea. See their demurrer, Or. Rec. p. 45, Pr. Rec. p. 19, and the certificate of evidence, which is the additional record filed by appellees, and the discharge in bankruptcy appearing in Add. Rec. p. 29, and in Pr. Add. Rec. p. 11.

The position assumed by appellees, that the decree must show error on its face to give the court jurisdiction to entertain a bill of review, would be in the courts of the United States an absurdity, while in England it is the rule, because in England the decree always contains a special statement of the material facts found by the court which

supports the decree, and it also embodies the substance of the bill, answer, and other pleadings; hence the errors, if there are any, appear on the face of the decree. In the courts of this country the decree does not contain the evidence in the case, nor any part of it, nor does it set forth the bill, answer, or any of the pleadings. Consequently, in this country, it is absolutely necessary to examine the bill, answer, and all the proceedings in the record, including the evidence, in order to examine all errors of law; for in our practice it is only by a comparison of the decree with the other portions of the record that errors of law can be discovered, or the correctness of the decree ascertained.

Story's Eq. Pl., § 407.

Dexter v. *Arnold*, 5 Mason, 311, 312.

Combs v. *Proud*, 1 Ch. Cas., 54.

Webb v. *Pell*, 3 Paige Ch. Rep., 368.

Wyatt Pr. Reg., 98.

In the American courts, where the English practice of reciting the proceedings in the decree does not prevail, the proceedings in the case are always the subject matter of revision in a bill of review, to the same extent and in the same manner as if they were stated on the face of the decree in conformity with the English practice.

Tomlinson v. *McKaig*, 5 Gilm., 258.

IV.

This sublime document, named a demurrer by appellees, contains the following intelligent and astounding averment: "Because it appears by the record and certificate of evidence, made a part of the bill of review, that complainant, Charles E. Shelton, was discharged in bank-

ruptcy at and before the sale of the mortgaged property under the decree of sale, and hath no interest in the subject matter of this litigation." This is judicial knowledge worthy of the gods; utterly astonishing and beyond ordinary judicial comprehension. These appellees, out here in a remote corner of suckerdom, have made the all-important legal discovery, hitherto wholly unknown, that a discharge in bankruptcy of a debtor from the burden of his debts works a legal and absolute confiscation of a vested estate. And they insist on applying their yet unpatented discovery to this case, and insist that when Charles E. Shelton was discharged by the bankrupt court from his indebtedness, he was by the same act discharged and forever ejected from his homestead, and has, therefore, "no interest in the subject matter of this litigation;" *a most important discovery indeed!*

Shelton and wife, in their answer to the original bill, allege "that the additional real estate security given by said Charles E. Shelton to secure said notes was and is the farm and homestead of these defendants; that said Charles E. Shelton is the head of a family, and a householder, and at present residing with his family on said farm in said homestead."

Or. Rec. p. 18, Pr. Rec. p. 8.

This answer of the appellants is incorporated in and a part of the bill of review, and the fact admitted by the appellees' demurrer, and after knowing the fact, and admitting the fact, of Charles E. Shelton's homestead rights in the premises in controversy, these astute appellees have persuaded a very able district judge (sitting in the Circuit Court) to overrule the law, contradict the record, and ignore common decency, by sustaining a demurrer on a

point admitted by them to be a lie and a fraudulent contrivance to deceive a usually discriminating judicial officer.

The discharge in bankruptcy discharged Mr. Shelton from his indebtedness, but certainly it did not discharge him from his homestead, or abrogate his rights therein. On the contrary, his homestead rights are specially protected by the Bankrupt Act. By that act the homestead of the bankrupt (and all property exempted from execution and forced sale by the laws of the state in which the bankrupt is domiciled) is expressly and positively reserved to him. That act, provides that "such property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale on execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state as existing in the year 1871," etc.

U. S. Stat. at Large, 1875, § 5045.

"As these provisions are founded upon the humane policy of providing means for the support of the poor man and his family, they are to be liberally rather than strictly construed. They should receive such fair construction as will best promote the beneficent intention of Congress."

Bump's Bankruptcy, 10th Ed., p. 153.

The statute of the State of Illinois in relation to the exemption of homesteads provides, "that every householder having a family shall be entitled to an estate of homestead, to the extent of $1,000, in the farm or lot of

land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts or other purposes, and from the laws of conveyance, descent, and devise," etc.

Chap. 52, § 1, page 483, Rev. Stat., 1877.

Had it been true to all intents and purposes that the appellant, Charles E. Shelton, could not maintain his bill in consequence of having been discharged in bankruptcy from the payment of his indebtedness, surely no such circumstance had intervened as to the other appellant, Roxanna Shelton. She had not been discharged in bankruptcy, *either from her debts or her homestead, nor had her homestead estate in the mortgaged premises been confiscated by any such discharge*, and to sustain the demurrer as to her on the insane delusion that she had no interest in the subject matter of the suit was worse than ridiculous.

Shelton, instead of being dispossessed of his homestead by his discharge in bankruptcy, was, on the contrary, protected in his possession and right of homestead by the very act to which he owed his discharge. So that, in sustaining the appellees' demurrer on the ground of Shelton's discharge from his indebtedness, it is very evident that "somebody blundered."

V.

In what manner, or how, the new matter set up in the bill in this case could be obnoxious to a demurrer, no ordinary judicial mind can discover (however, we were not dealing with ordinary judicial minds in the court be-

low). To admit the facts alleged is simply to sustain the bill.

The fraudulent sale of the premises, and consequent injury to the appellants, is fully admitted by the appellees in their demurrer, and we insist that the sustaining of the demurrer to that portion of the bill was an error bordering upon the insane. It was an outrage upon every sense of justice, on law, equity, and common sense. Under no possible circumstances could the new matter set up have been obnoxious to a demurrer.

Welf. Eq. Pl., 243.

Milf. Eq. Pl., 204.

We are not without precedent in this case. A case almost similar (only that the fact was not admitted by demurrer, as in this case) has received a judicial determination in this state. In McConnell *v.* Gibson, a mortgage was foreclosed, a commissioner was appointed to sell the mortgaged property, who sold it, reported the sale to the court, which approved the report and confirmed the sale. Afterwards a bill of review was filed, setting up the fact that a third person had purchased the property from the commissioner at the sale, and that the property was purchased for the commissioner himself, and praying that the case be reviewed, the order of the court confirming the commissioner's report be vacated, and the sale set aside. The court held that the sale was a fraud in law, that the bill came precisely within the definition of an original bill, in the nature of a bill of review, as laid down in Grigg *v.* Gear, 3 Gilm., 2, and in Story's Eq. Pl., § 426, and that it could be filed as a matter of right.

McConnell v. *Gibson*, 12 Ill., 128.

In our judgment, this case of McConnell *v.* Gibson

is conclusive on the question of the new matter alleged in the bill in the case at bar.

Therefore, upon the record, the errors assigned, the points suggested, and authorities cited, we submit this cause to the determination of this honorable court, confidently hoping that the decree of the Circuit Court may be in all things reversed, and the cause remanded with proper directions to the court below.

LEWIS E. PAYSON,
CHARLES J. BEATTIE,
Attorneys for Appellants.

16-532

OFFICE SUPREME COURT U.S.
FILED
DEC 6 1882
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT of the UNITED STATES.

No. 888.

CHARLES E. SHELTON AND ROXANNA SHELTON,
Appellants,

vs.

EDGAR M. VAN KLEECK ET AL.,
Appellees.

Brief and Argument for Appellees.

JOHN I. BENNETT,
COUNSEL FOR APPELLEES.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, A. D. 1882.

No. 888.

CHARLES E. SHELTON AND ROXANNA SHELTON,
Appellants,

vs.

EDGAR M. VAN KLEECK ET AL.,
Appellees.

STATEMENT.

On the 18th day of November, 1877, Edgar M. Van-Kleeck, the principal appellee, filed a bill in the Circuit court of the United States for the Northern District of Illinois, against the appellants and others, to foreclose a mortgage or trust deed which was executed September 21, 1871, to secure $9,000, with the interest to accrue, upon certain lands in Livingston county, Illinois. Appellants filed their joint and several answer, and Elizabeth Blue her separate answer to said bill on the 6th day of September, 1877, setting up various defenses,

and, among others, the defense of usury, partial payment of amount claimed, and that other land than appellants' should be made to pay a large part of the amount claimed. The cause was then referred to a master to take evidence and report his conclusions thereon—the defendants other than appellants and Elizabeth Blue, all having been defaulted.

On the 28th day of April, 1879, the master filed his report, dated April 1, 1879. Exceptions were filed to the report of the master May 15, 1879; which exceptions were overruled by the court, and upon a hearing then had upon the merits, the court entered a decree of foreclosure. This decree settled all the questions of fact put in issue by the pleadings, including the merits of the defenses set up as above stated by appellants. No appeal was ever taken from this decree. On the 30th day of September, 1879, the master in chancery, in pursuance of the decree, sold the premises directed to be sold; and on the 10th day of October, 1879, filed his report of sale in said cause. No exceptions were filed or taken to the report of sale; and the report was approved and sale confirmed by virtue of the eighty-third rule in chancery, in December, 1879. Subsequently, and on the 15th day of December, 1880, the court entered a special order confirming the sale. On the 31st day of December, 1880—the last day allowed by law for redemption from the sale by a creditor—appellants filed in the cause a motion to set aside the sale. The motion was heard on the 12th day of January, 1881, and overruled by the court. The master thereupon executed his deed to appellee, VanKleeck, and he was put into possession of the premises by the marshal. Upon the hearing of the motion, to set aside the sale, the additional facts were shown that appellant, Charles E. Shel-

ton, whose lands were covered by the mortgage, had been discharged in bankruptcy, his assignee having been appointed October 22, 1879, after the master's sale, and he having received his final discharge in bankruptcy May 28, 1880. An appeal was prayed and allowed from the order of the court overruling the motion to set aside the sale, and that order is not otherwise annulled. This is a bill of review based upon this record. All of the above facts appear upon the face of the bill, and the exhibits expressly made a part of it. It makes the bill of foreclosure, the answer of appellants, the master's report upon the evidence and the evidence therewith, the motion to set aside the sale, and the evidence introduced upon that motion, a part of the bill.

A demurrer was interposed to this bill, and the court sustained the demurrer, and dismissed the bill. In this bill of review all of the defendants in the foreclosure case, other than appellants, and, others deemed to have acquired interests under the sale, are made co-defendants with VanKleeck, the principal complainant in the original case, and do not seek to question the legality of the proceedings in the Circuit court. No evidence whatever was introduced upon the hearing of the demurrer. The bill of review itself incorporated and made a part of itself, the motion to set aside the sale and the evidence adduced thereon, including Shelton's bankruptcy proceedings; the report of sale by the master, and the order of confirmation thereof, as well as the proceedings, including the evidence, in the original case.

This statement on the part of appellees is deemed proper, because the case is hardly intelligently stated in appellants' brief, and many of the statements made therein are misleading and controverted.

ARGUMENT.

May it please the Court: By the way of premise to the argument, it should be stated that counsel for appellants entirely mistake the character of the admissions of the demurrer. The bill to which it was interposed—as all such bills are required to do—alleged the *existence* of certain records and proceedings in the court below, to wit—the pleadings, the findings and reports of the master, the decrees of the court, and the evidence introduced. Whether the allegations of appellants' answer were true or false, whether the findings of the master or court were in accordance with the preponderance of the evidence, were correct or erroneous, are not involved or admitted by the demurrer. The admissions of the demurrer entertained solely for the purpose of testing the sufficiency of the bill, are that the records and proceedings set out and alleged in the bill of review exist as facts upon the record of the Circuit court.

Nor is the *form* of the bill of review seriously drawn in question. The demurrer challenges the *sufficiency* and substance of the cause made by the bill. There is no serious controversy as to what constitutes a record and what should be set out in a bill of review.

The authorities do not warrant, as was attempted in this bill, the making of the entire evidence accompanying the master's report, and considered on the hearing upon the entry of the original decree, a part of it; but as the evidence is not certified here, that branch of the bill must be considered as abandoned by appellants.

Appellees desire a determination of this cause upon its

merits, but their counsel would hardly be justified in failing to suggest to the court that the brief filed here on behalf of appellants is not in compliance with the 21st rule.

Phillips' Practice, 208–9.

Counsel for appellants construe the scope and purpose of their bill of review to be, "first, to reverse the former "decree of the Circuit court," * * * "for errors of "law appearing on the face of the record, in the case "sought to be reviewed; and, second, on account of *new* "*matter* which had arisen *out of* facts and circumstances "which *had occurred* in certain proceedings in the case "*subsequent* to the entry of the decree, and pertinent to "the issue, which *new matter* was a breach of the de-"cree by the master in chancery, who was charged with "its execution." (Appellants' brief, 1 and 2.) This is the entire scope, as stated by counsel, of the bill of review, and the sole ground for the reversal of the proceedings in the Circuit court.

A brief statement and application of a few of the fundamental principles govering proceedings by bill of review will set at rest all claims of counsel for appellants, for the reversal and revision of the proceedings of the Circuit court.

I.

A bill of review cannot be maintained on the ground that the court has decided wrong on a question of fact, or that the decree is contrary to the proofs in the case.

2 Danl. Chanc'y Pr., 1576, (tp. paging 4th, Amer. Ed.)

Story's Eq. Pl., § 407.

Mellish v. *Williams*, 1 Vern., 166.

Whiting v. *The United States Bank*, 13 Pet., 14.
Bartlett v. *Fifield*, 45 N. H. R., 81.
Barnum v. *McDaniels*, 6 Vt., 177.
Webb v. *Pell*, 3 Paige, 368.
Young v. *Henderson*, 4 Haywood, 189.
Dougherty v. *Morgan*, 6 Monroe, 153.
Eaton v. *Dickenson*, 3 Sneed, 397.
Getzler v. *Saroni*, 18 Ills., 517.
Evans v. *Clement*, 14 Ill., 208.
Dexter v. *Arnold*, 5 Mason, 303.
Turner v. *Berry*, 3 Gilm., 544.
Griggs v. *Gear*, *Id.*, 10.
Garrett v. *Mass*, 22 Ill., 365

This court said, in the case of *Whiting et al.* v. *The Bank of the United States*, 13 Pet., 14: "You are not at "liberty to go into the evidence at large in order to es- "tablish an objection to the decree, founded on the sup- "posed mistake of the court in its own deduction from "the evidence." Such is the language of all of the authorities.

A principle so elementary, and so uniformly supported by the authorities, would not justify a further discussion.

Although counsel for appellants propose, as we have seen, to have brought this bill, so far as relates to the original decree, for error in the law, they proceed, on pages 2 and 3 of their brief, to set out nine assignments of error, and urge them as grounds for reversal of the original decree. (See appellants' brief, 2 and 3, and record, 12.)

The first, second, third, fourth, fifth and ninth of these

alleged assignments of error, professedly draw in question the correctness of the decision of the Circuit court, in determining the questions of fact involved in and settling the original decree of foreclosure — in determining the amount which was due on the mortgage, the question of usury, and the question also involved in the pleadings, as to the order in which the mortgage premises should be sold. Although, seeming to question the determination of these mere questions of fact, appellants have failed to bring to this court any of the evidence upon which an argument as to the allged errors of judgment of the court, in determining them, would necessarily have to be based. And were it competent for the court to look into the evidence — as we have seen it is not — this court would presume, in the absence of the evidence, that the findings and decrees of the Circuit court were correct. This would seem to dispose of the assignments of error referred to.

The remaining assignments, being the sixth, seventh and eighth, are not supported by the facts in the record — on the contrary, are directly contradicted.

(Record, 12.) The decree determined the rights of all the parties defendant to the original bill to foreclose the mortgage, other than appellant and Elizabeth Blue. It in express terms determines the rights of Elizabeth Blue, and among other things, decrees, "that the rights and interests "of the defendants in this cause in said land are subject "and inferior to the lien of said complainant." The decree also finds that the bill was "taken as confessed by "the defendants, James E. Morrow, Martha Secor, A. F. "Fisher, Julius Rosenberg, Moses Rose, Peter Tewilliger, "Elias Greenebaum, Gerhard Foreman, and Andrew S. "McMillan" (all except the three latter shown by the bill

to be judgment creditors of Shelton), and also states that Elizabeth Blue filed answer. (Record, 9). Appellants have omitted from the record the latter's answer.

The decree also determines that "the defendants in "this cause, and all persons claiming by, through or "under them, or either of them, since the filing of the "original bill of complaint in this cause, be *forever* "*barred and foreclosed* from all equity of redemption," &c.

(Record, 11.) There is no statement in the record contradictory to these findings. There is no allegation anywhere that any defendant answered and at the same time was defaulted.

So that these assignments, professing to be made upon the face of the decree, are directly contradicted by the decree itself.

The decree was entered against *all* of the defendants (if it were not these appellants could not complain), and the suit as to all of them was determined.

This, then, it would seem, disposes wholly of all of the assignments of error made in the bill of review and repeated in the brief of counsel. The first five and last simply questioned the correctness of the court's decision upon the evidence in settling the facts found in the original decree (which we have shown cannot be done); the other three assignments are distinctly contradicted by the record itself.

II.

A bill of review will not lie to proceedings subsequent to the final decree and in execution of it.

The decree of sale is the final decree in a foreclosure case, and from it an appeal will lie to the Supreme Court.

Whiting v. *The Bank of the United States*, 13 Pet., 15.

The bill of review in this case, although it contains allegations as to alleged irregularities at the sale in execution of the decree assigns no error upon it.

In such case it would seem on principle that appellants ought not to be permitted to assign errors in the Supreme court which were not assigned in the bill of review.

The supposed errors should first be pointed out to the Circuit court by way of assignment in the bill of review.

It would seem that the Circuit court, in passing upon *alleged* errors brought to notice by bill of review, would stand in an analagous position to an intermediate appellate Court from whose decisions appeals lie to a superior court of final determination.

The Supreme court of Illinois uniformly holds that no assignment of error will be considered in that court which have not been made in the appellate court.

Diversy, Adm'r, v. *John*, 93 Ill., 547.
Smith v. *Brittenham*, 94 Ill., 626.
Braidwood v. *Weiller*, 89 Ill., 606.

But should this court deem the practice otherwise, and allow assignments to be made for the first time in the brief of counsel, as stated above, the bill will not lie for matter subsequent to and arising in execution of the decree.

In the case of *Whiting et al.* v. *The Bank of the United States*, 13 Pet., 15, this court said: "The original "decree of foreclosure and sale was final upon the merits

" of the controversy. The defendants had a right to ap-
" peal from that decree, as final upon the merits, as
" soon as it was pronounced, in order to prevent an irre-
" parable mischief to themselves. For if the sale had
" been completed under the decree, the title of the pur-
" chasers under the decree could not have been over-
" thrown or invalidated even by a reversal of the decree,
" and consequently the title of the defendants to the land
" would have been extinguished, and their redress upon
" the reversal would have been of a different sort from
" that of restitution of the land sold. In *Ray* v. *Law*
" (3 Cranch R., 179) it was held by this court that a de-
" cree of sale of mortgaged premises was a final decree,
" in the sense of the act of congress, upon which an ap-
" peal would lie to the Supreme court. This decision
" must have been made upon the general ground that a
" decree, final upon the merits of the controversy between
" the parties, is a decree upon which a bill of review
" would lie, without and independent of any ulterior pro-
" ceedings. Indeed, the ulterior proceedings are but a
" mode of executing the original decree, like the award
" of an execution at law."

" If this be the true view of the present decree, and the
" proceedings thereon, then it is plain that this bill of re-
" view is not maintainable, for two reasons, each of which
" is equally conclusive. The first is, that no error is shown
" in the original decree, *for the only pretended error 'is in*
" *the sale under the decree.'*"

The case of *McConnell* v. *Gibson*, cited in the brief of counsel, was not a bill of review. It was, in its scope and purpose, an original bill, impeaching the sale for fraud, in the exercise of a well known ground of original jurisdiction of a court of chancery.

III.

But should the court hold that the subsequent proceedings in execution of a final decree constitutes proper subject for bill of review, then the demurrer was properly sustained to this portion of the bill, for the following reasons:

1. The same matter complained of in the bill of review was involved in the motion to set aside the sale, made before the Circuit court, Hon. Thomas Drummond sitting. Affidavits were read by appellants in support of the motion, and record evidence was adduced in defense.

The court tried the same questions involved here, and decided them upon the evidence. Whether right or wrong, the decision of the Circuit court upon the mere questions of fact involved in that motion, to wit: Whether the master had properly executed the decree (in making the sale) cannot be questioned, as we have already seen, by this bill of review. That is all that it is necessary to determine here. But were it otherwise, the decision was clearly right. The report of the master showed a full compliance with the decree. Shelton was present at the sale, and filed no exceptions to the master's report. The report and sale stood approved and confirmed by operation of the 83d rule in chancery, and was confirmed afterwards by a special order entered in the cause. Appellants had the statutory right of redemption; but failed to exercise it until the last day of the fifteen months, when this motion was made to set aside the sale. Meanwhile, Charles E. Shelton had ceased to have any interest in the property. His assignee in bankruptcy was appointed soon after the sale, and whatever interest Shelton had in the property passed to his assignee. There is no pre-

sumption that it was claimed as a homestead in the bankruptcy proceedings, and it certainly is not shown. Besides, both he and Roxanna Shelton released all homestead rights in the trust deed, and all that passed to the assignee was the mere equity of redemption.

He received his discharge in bankruptcy before this bill was filed. He had, therefore, at the filing of the bill, as shown by the bill itself, no interest in this property. He could not, therefore, be aggrieved or have the right to file the bill.

Webb v. *Pell*, 3 Paige, 368.
Lansing v. *Albany Ins. Co.*, Hopk., 116.
Thomas v. *Harvie's heirs*, 10 Wheat., 146.
Story's Eq. Pl., Sec. 409.

So it is clear that were the decision of the eminent circuit judge who decided the motion, a proper subject of review, no error was committed in refusing the motion to set aside the sale.

2. Where a bill of review is filed for "new matter," it must be for matter which was in existence *at the time the decree was rendered*, and not known until afterward.

Bledsoe v. *Carr*, 10 Yerg., 57.
Winchester v. *Winchester*, 1 Head., 460.

In the case of *Bledsoe* v. *Carr*, *ante*, the court say:

"The merits of the question depend on the construction "to be given to the word 'arisen.' For the complainants "it is argued to mean new matter which has *come into ex-* "*istence* after the decree in the original cause; whilst for "the defendant it is said to mean matter which *was in esse* "at the time the decree was given, but which was not in "the knowledge of the party claiming the benefit of it by "bill of review. * * * The court is re-

"lieved from * difficulty by the construction which "has been given to it by well considered authorities."

In the case of *Sir Thomas Standert* v. *Radley*, determined in 1741, and reported in 2 Atk., 177, Lord HARDWICK, in discussing this subject, says:

"The rule to review and revise a former decree is the "dicovery of new matter since the making of such de-"cree, which was in being at the time, but not known to "the party until afterwards."

The court, after citing the case of *Goatside* v. *Isherwood*, Dickens' Cha. Rep., 612, says:

"These two cases must be considered as settling this "question, as we think, clearly on principle."

In the case at bar, the "new matter" sought to be made the subject of this bill of review is alleged to be "new matter" which "had arisen out of the facts and circum-"stances which had occurred in certain proceedings in "the case *subsequent* to the entry of the decree, and per-"tinent to the issue."

This is indeed a novelty, when tested by the authorities; and with respect to it, counsel are certainly entitled to the doubtful credit of original discovery. That matter, arising out of the decree, and subsequent to it, could avail to reverse and revise the decree of a court entered prior to the existence of the facts, is a position too absurd for argument.

But it was in no sense "new matter," so far as relates to the order of court refusing to set aside the sale; for all of the evidence now known upon the subject was adduced before the court upon that motion, and is embraced in this record. (Add. Rec., 1–13.)

3. Before a bill of review can be maintained, the decree sought to be reviewed must be *obeyed.*

Wiser v. *Blachly*, 2 Johns. Cha., 488.

What have appellants done in obedience to the decree here? Nothing. Every step taken by them is shown to have been in *resistance* of *the decree.* There was a large deficit at the sale. appellants have never paid, or offered to pay this deficit to VanKleeck. Large amounts were paid by him for taxes even before the sale; they have never offered a reimbursement of them. They have declined to redeem, and at the last hour moved to set aside the sale.

They refused to surrender possession after the time of redemption had expired, and were put out by the marshal under process. Even in the bill there is no offer of payment or restitution. The allegation of performance, when coupled with these facts, clearly appearing on the face of the bill, amounts to nothing. Surely no such obedience to the decree is shown here, as entitles appellants to bring their bill of review.

Wiser v. *Blackley*, 2 Johns. Ch. R., 488.
Livingston v. *Hubbs*, 3 Johns. Ch. R., 124.
Griggs v. *Gear*, 3 Gilm., 2.
Homer v. *Zimmerman*, 45 Ill., 14.

4. Where the statements appearing on the face of a bill of review itself, show an entire want of equity, it should be dismissed upon demurrer. Such would be the disposition of it upon hearing upon the merits, or resistence to application to file.

Story's Eq., Pl., Sec. 417.
Elliott v. *Balcom*, 11 Gray, 286.

And there can no reason be assigned why the same result should not follow its determination upon demurrer.

The allegations of the bill, including the exhibits made a part of it, show a most inequitable case. The mortgage was for money loaned. Suit was commenced in 1877, over five years ago. Defense was interposed and decree delayed for two years. Neither taxes nor interest were paid by appellants. When a sale was reached, the security was inadequate, and a deficiency of payment occurred of $842.28, besides taxes paid subsequent to the decree. (Add. Rec., 8.) The bankruptcy of Chas. E. Shelton made it impossible to collect this deficiency Under the statutes of Illinois the bankrupt, appellant, remained in possession, availed himself of the rents and profits, and made no effort to redeem, then interposed his motion to set aside the sale, at which he was confessedly present when it was made, and finally, without any tender, payment or performance of the decree, as we have shown, or excuse for non-performance, the appellants bring this bill of review, not only against Van Kleeck, the original complainant, but also against *bona fide* purchasers of the title which passed under the decree of foreclosure.

Story's Eq. Pl., § 417.

Taken all together, the allegations of this bill make a case entirely without equity, and a court might well sustain a demurrer to it on that ground alone.

May it please the Court, this is all there is of this case —a case in which the facts stated in this argument appear on the face of the bill itself—a case so glaringly opposed to every elementary principle governing the course of procedure in bills of this sort, that the Circuit court would

have been guilty of palpable error had it not sustained the demurrer and dismissed the bill as it did.

In so bald a case as this is on the part of appellants, it is not so strange as it otherwise would have been, that one of the counsel for appellants, who evidently prefixed the name of his associate to the brief filed here, without consulting him as to the obnoxious language used, has exhibited the bad taste—not to use more severe language—to make an unwarrantable attack upon the justly distinguished and upright judge who decided the demurrer in this case, in the only way in which a conscientious and intelligent court could decide it.

Such an exhibition of ill-breeding and forced violence of language, surely will not tend to commend the argument of counsel or convince the court that a cause in which such vehemence of language is deemed necessary, is sufficiently strong and just to stand of its own strength and upon its own merits.

May it please the Court, I submit, upon these considerations, that the decree of the Circuit court, sustaining the demurrer to and dismissing this bill of review, should be affirmed.

JOHN I. BENNETT,
Solicitor and of counsel for Appellees.

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OFFICE SUPREME COURT U. S.
FILED
DEC 21 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 888.

October Term, A. D. 1882.

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vs.
EDGAR M. VAN KLEECK, ANDREW S. McMILLAN, et al. *Appellees.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY OF APPELLANTS.

LEWIS E. PAYSON, CHARLES J. BEATTIE,
Attorneys for Appellants.

CHICAGO:
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REPLY OF APPELLANTS.

May it please the Court:

Counsel on both sides of this case have agreed to submit the questions at issue in this case to the determination of the court on printed briefs and without oral argument, and although we do not regard the brief filed by the learned counsel representing the appellees as conveying much light on any of the questions involved in the case, we deem it our duty to correct some of the misstatements and mistakes which it contains.

Appellees' counsel seems to have become possessed of the idea from the time that this bill of review was first exhibited, and he entered on the defense that he was fighting the original case, and he seemed to have utterly lost sight of the fact that the case could be reviewed in the court where the decree was rendered: indeed, that was the first position which he assumed in the case, which he urged in the court below, and which he now insists on, only in another form, in this court. His position in the court below was, that all the questions in this case were matters which had been "heard and determined by the court in and by the final decree," and "could not be the subject of a bill of review." See appellees' demurrer, Or. Rec. p. 44. Pr. Rec. p. 19.

In this court, appellees' counsel changes his ground somewhat by insisting that as no appeal had been prosecuted from the original decree, that the decree was final and could not be reviewed. This is certainly all that can be gleaned from his second point on pp. 9, 10 of his brief.

In his third point, appellees' counsel assumes the same position here that he did on that question in the court below, that the new matter set up in the bill the fraudulent sale by the master in chancery was before the Circuit Court on motion to set aside the sale: that the decision of the Circuit Court on that motion was final, and that the question cannot be reviewed. This is what appellees' counsel means, if he means anything.

We desire to call attention to his assumptions as set forth in his brief, and to correct some of his mistakes.

The bill in the original cause was filed November 10, 1877, and not November 18, 1877, as stated in appel-

lees' brief (see Or. Rec. p. 2, Pr. Rec. p. 1), and appellants' answer was filed on the 6th of December, 1877, (see Or. Rec. p. 11, Pr. Rec. p. 5), and not on September 6, 1877 (two months before the filing of the bill), as stated in appellees' brief. The cause was referred to a master to take the proofs, and although the appellants closed their proofs before said master in June, 1878, the master did not file his report until the 28th day of April, 1879. There were no delays, no motions, demurrers, or dilatory proceedings of any kind, interposed by appellants. The delays, wherever interposed, came not from appellants. They filed their exception to the master's report as soon as counsel could examine it, on the 15th day of May. Within eighteen days of the filing of the master's report the appellant's exceptions were on file. There was no hearing upon the merits. As soon as the exceptions were heard the exceptions were overruled, wifhout the examination of a single deposition by the judge (see Or. Rec. p. 22, Pr. Rec. p. 9). The master's report was confirmed, and the decree entered and appeal was duly prayed (see Or. Rec. p. 27, Pr. Rec. p. 11), but could not be perfected by appellants, in consequence of Mr. Shelton's bankruptcy, they were unable to give the required bond, and they were therefore unable to prosecute an appeal.

The master sold the premises on the 30th of September, 1879. On December 31, 1880, and before the time of redemption from the master's sale, the appellants moved to set aside the sale on affidavits (see Add. Rec. pp. 1, 12, Add. Pr. Rec. pp. 1, 5). The motion was overruled by the court, and an appeal prayed and allowed, with bonds fixed at an amount which appellants, in consequence of Mr. Shelton's bankruptcy, were utterly unable to give, so that to prosecute the appeal at that time was to appellants impossible.

The master in chancery then executed a deed to Van Kleeck, a writ of restitution was issued pursuant to the decree, which was implicitly obeyed by the appellants by giving up possession of the premises to the marshal who held the writ of restitution, and the decree fully complied with and performed as far as in the power of appellants to do so. This is a correct statement in brief of the facts in the original case prior to the filing of the bill of review.

REPLY TO APPELLEES' POINTS.

I.

A large portion of appellees' first point is devoted to demolishing a mythical image set up by counsel; he covers parts of two pages of his brief (pp. 6, 7) in endeavoring to demonstrate an elementary principle which no lawyer ever disputed. He says, "That a bill of review cannot be maintained on the ground that the court has decided wrong on a question of fact," and he has cited numerous authorities, covering nearly a page of his brief, in support of a principle that has never been controverted, as far as we have any knowledge on the subject.

Appellees' counsel seems to have been bewildered all through this case, and among his many fanciful assumptions he now gravely assumes that appellants are insisting on reversing the decree in the case at bar, for the reason "that the court below has decided wrong on a question of fact." How appellees' counsel could make such a strange mistake is astonishing, when on page six of our brief we distinctly announced our position in the case at bar, with the authorities in support of it, as follows:

"In this case the bill is brought, first, to review and

reverse the decree for error apparent in the record; second, for newly-discovered matter that was unknown, and not only unknown, but which had not occurred at the time that the decree was entered.

"The bill is prepared according to the strict rules of equity practice; it contains the proceedings in the former case, copies of the bill, answer, decree, and other proceedings in the original case; also the new matter discovered, with errors assigned, and the grounds on which the original decree is sought to be impeached.

"*Gardner* v. *Emerson*, 40 Ill., 296.

"*Goodrich* v. *Thompson*, 88 Ill., 286.

"Story's Eq. Pl., sec. 120.

"*Dougherty* v. *Morgan*, 6 Mon., 151."

Appellees' counsel further assumes (see his brief, p. 6) that in the case at bar we are endeavoring to reverse the decree "on the [ground of] the supposed mistake of the court in its own deductions from the evidence," and as the decree does not contain the evidence a bill of review cannot be maintained in this case. In the court below he insisted that unless the errors (if any in the record) appeared on the face of the decree, a bill of review would not lie, and in our brief (on pp. 11, 12) we called attention to his position on that question in the following language, and cited the following authorities:

"The position assumed by appellees, that the decree must show error on its face to give the court jurisdiction to entertain a bill of review, would be in the courts of the United States an absurdity, while in England it is the rule, because in England the decree always contains a special statement of the material facts found by the court which

supports the decree, and it also embodies the substance of the bill, answer, and other pleadings: hence the errors, if there are any, appear on the face of the decree. In the courts of this country the decree does not contain the evidence in the case, nor any part of it, nor does it set forth the bill, answer, or any of the pleadings. Consequently, in this country, it is absolutely necessary to examine the bill, answer, and all the proceedings in the record, including the evidence, in order to examine all errors of law; for in our practice it is only by a comparison of the decree with the other portions of the record that errors of law can be discovered, or the correctness of the decree ascertained.

" Story's Eq. Pl., § 407.

" *Dexter* v. *Arnold*, 5 Mason, 311, 312.

" *Combs* v. *Proud*, 1 Ch. Cas., 54.

" *Webb* v. *Pell*, 3 Paige Ch. Rep., 368.

" Wyatt Pr. Reg., 98.

" In the American courts, where the English practice of reciting the proceedings in the decree does not prevail, the proceedings in the case are always the subject matter of revision in a bill of review, to the same extent and in the same manner as if they were stated on the face of the decree in conformity with the English practice.

"*Tomlinson* v. *McKaig*, 5 Gilm., 258."

To these positions appellees' counsel has not attempted any sort of lucid or practical reply, nor can they be controverted on principle. Because, in the very nature of things, the errors that creep into a record can seldom appear on the face of the formula prepared as a decree in the American courts.

The next strange assumption of appellees' counsel is that appellants' first, second, third, fourth, fifth and ninth assignments of error are simply errors of fact (see his brief, pp. 6, 7).

Take two of these "errors assigned" as samples, and see whether they are errors of law or fact. The fourth assignment is as follows:

"That said decree is usurious, and grants and pronounces in favor of usurious interest, and gives usury and usurious interest to the complainant, and that a large amount of usury and usurious interest, to-wit, about $5,000, is duly incorporated in and forms part of the amount of said decree."

Or. Rec. p. 28, Pr. Rec. p. 12.

We are under the impression that $5,000 of usurious interest in a decree (where not denied, but admitted) is a rather serious error of law.

The law declares that any person or corporation in Illinois who shall receive usurious interest upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest, and shall be entitled only to recover the principal sum due.

Rev. Stat. of Ill., chap. 74, § 6, p. 589, of 1877.

It is admitted that one of the defenses interposed was usury (see appellees' brief, p. 2), and we are inclined to the opinion that this is an error of law well assigned.

The fifth assignment sets forth:

"That said decree unjustly and oppressively discrim-

inates against your petitioners in this, that it arbitrarily provides for selling your petitioners' homestead first, thereby exposing their farm and home to sacrifice, and it also provides that the farm and homestead of Elizabeth Blue shall not be sold for more than $4,000, thereby arbitrarily compelling a sale of your petitioners' homestead for $8,667.25 and the costs of sale."

Or. Rec. p. 28, Pr. Rec. p. 12.

This was in direct violation of the statute of 1845, in force at the time of the making of the contract (the mortgage having been executed in 1871), which provides that the homestead or land on which the defendant resides shall be last taken in execution, also excepting and reserving exempt property.

Rev. Stat. of Ill. of 1845, chap. 59, § 9, p. 301.

This statute also provides that all decrees in chancery shall have the same force, and be subject to the same limitations and restrictions as judgments at law.

Rev. Stat. of Ill., 1845, chap. 21, § 45, p. 98.

So that it will be seen that this decree absolutely *abrogated the statute of the state*, as far as such a decree could do so, in order to sell appellants' homestead first, and for the whole amount of the decree except $4,000. This decree, then, being contrary to the statute, and in defiance of the same on this question, we think the fifth assignment an error of law properly assigned, and the point well taken.

Appellees' counsel also asserts that "The remaining assignments, being the sixth, seventh, and eighth, are not

supported by the facts in the record—on the contrary, are directly contradicted. The decree determined the rights of all the parties defendant to the original bill to foreclose the mortgage" (see his brief, p. 7), and that "the decree was entered against all of the defendants" (brief, p. 8). The record discloses the fact that William M. McGregor was made a party defendant in the original bill to foreclose the mortgage. The bill alleged that (he) William M. McGregor (with several others) claimed to have some interest in said real estate, as a judgment creditor or otherwise (Or. Rec. p. 7, Pr. Rec. p. 3), and prayed that (he) William M. McGregor be made a defendant (with the others), and be compelled to answer the bill (Or. Rec. p. 10, Pr. Rec. p. 4). Process issued against him (with the others), and he was regularly served by the marshal in due form. The marshal's return showing service on McGregor is the last thing seen of him in the proceedings. He did not answer, was not defaulted, and was not named in the decree, nor was the bill dismissed as to him, nor was he in any manner discharged from the case, and to all intents and purposes as to him the bill is still pending and undetermined as far as his rights are concerned. Appellants made William M. McGregor a party to their bill of review in consequence of his being a party in the original bill (see Or. Rec. pp. 42, 43, 47, Pr. Rec. pp. 18, 20).

Yet, in the face of this record, appellees' counsel has the extreme recklessness to allege positively in his brief that "the decree determined the rights of all the parties in the original bill," and that "the decree was entered against *all* of the defendants."

It must certainly be apparent to the court that appellants' seventh assignment of error is well taken.

II.

In his second point appellees' counsel has reported to this court a new principle in equity, to-wit, that a bill of review will not lie to any proceedings in a chancery cause subsequent to the final decree (p. 8.) This position is too ridiculous and absurd to demand a reply.

Appellees' counsel has also discovered a new kind of equity practice. He insists that the malfeasance, misfeasance, and general blunders of ministerial officers should be assigned as errors on the record, and he gravely informs the court in his brief (p. 9) that "the bill of review in this case, although it contains allegations as to alleged irregularities at the sale in execution of the decree, *assigns no error upon it.*" In his view, the errors of ministerial officers, blunders of the clerk, mistakes of the master, and shortcomings of the marshal and all his deputies, should be assigned as errors on the record as well as the errors of the court. We might search all the realms of jurisprudence in vain for practice such as this, for wisdom so profound. We give it up. To us it is an unfathomable mystery. But appellees' counsel abounds in the mysterious, and is continually uttering strange things. He positively asserts that "the case of McConnell *v.* Gibson cited (in our brief) was not a bill of review."

That is a paltry equivocation unworthy of counsel. We stated in our brief that the bill in that case "came precisely within the definition of an original bill in the nature of a bill of review." This view is sustained by the report of the case. The court there say:

"The true object of this bill is to set aside the sale, and to review, reverse, and vacate the order of the court

confirming the report of sale, whereby the final sanction of the court was given to the sale. This is asked upon the ground of fraud. The bill shows that a fraud was practiced upon those interested in the mortgaged premises, and upon the court.. * * * * This bill comes precisely within the definition of an original bill in the nature of a bill of review as laid down by this court in the case of Gregg v. Gear, 3 Gilm., 2, and Story's Eq. Pl., § 426."

McConnell v. *Gibson*, 12 Ill., 128.

In that case the court also held that, no matter by what name the bill may be called, it was properly filed to review the order confirming the fraudulent sale of the mortgaged premises, and the new matter set up in the case at bar is for the same purpose precisely.

III.

In his third point appellees' counsel again brings forward his oft-repeated and hackneyed theory that as the circuit judge had overruled appellants' motion to set aside the master's sale, the decision of the circuit judge cannot be reviewed in his own court, or elsewhere. This same circuit judge, "eminent for learning, ability, and integrity," thought otherwise. Appellants' counsel made application to him for leave to file this bill of review; we served written notice on appellees' counsel that we would apply to the circuit judge for leave to file this bill; appellees' counsel failed to appear, and at the appointed time we produced the notice, read the bill, and the judge having examined the bill as to its scope and purport, granted leave to file the bill. The record shows the order of the court, as follows:

"On the same day, to-wit, the twenty-second day of August, in the July term, A. D. 1881, of said court, in the record of the proceedings thereof in said entitled cause, appears the following, to-wit, before the Hon. Thomas Drummond, circuit judge:

"And now come Charles E. Shelton and Roxanna Shelton and move the court here for leave to file their bill of review in this court, and it appearing that due notice of this motion was duly given to defendants' solicitor, and the court being sufficiently advised in the premises, it is ordered that leave be granted to said complainants to file their bill of review herein without prejudice."

Or. Rec. p. 34, Pr. Rec. p. 14.

It never occurred to the circuit judge that he could not review his own decisions in a chancery case on a bill of review.

Another new theory discovered by appellees' counsel is that there can be no *new* matter alleged in a bill of review. No! It must be *old* matter which existed prior to the entry of the decree. Heretofore chancery lawyers have always believed that *old* matter existing at the time of filing the bill, and not discovered until afterwards, should be brought in by amendment to the bill before the entry of the decree. However, appellees' counsel says such *old* matter must be presented by bill of review. But the authorities which he cites do not in any sense support his theory, nor can a well-considered opinion of any respectable court in the universe be cited in support of a theory so absurd.

Appellees' counsel asserts that appellants have not

obeyed the decree; that they have resisted it; that there was a deficit at the sale which they have not paid; that large amounts were paid by Van Kleeck for taxes, and that they refused to surrender possession (brief, p. 14).

This is certainly *new* matter set up by appellees. This record will be searched in vain for any resistance to the decree. The story that large amounts have been paid by Van Kleeck for taxes has been advanced here for the first time, and is contradicted by the record. That there was a deficit at the sale was not the fault of appellants; it was the fault of the master fraudulently selling the premises at a time and place not advertised. The record shows that the "master in chancery advertised said premises for sale, to be sold by him at the south front door of the said court house, at the hour of one o'clock P. M., on the 30th day of September, A. D. 1879, and that he failed to sell said premises at said place, and that on the contrary he sold said premises at the north door of said court house, at a place not advertised, and not frequented by people, and that in consequence of such fraud or negligence there were no bidders at said sale, except the complainant's agent, Mr. John W. Woodrow, who bid in said premises for the plaintiff at said complainant's own price and on his own terms, to the injury and oppression of your petitioners."

This is the reason of the deficit at the sale, and this is admitted by appellees' demurrer. In this fraudulent manner appellees sold for a trifle over $12,000 one of the best stock farms in Illinois, valued by appellants at $30,000, and now their counsel tells appellants that they have no equities in the premises that should be respected by a court of conscience.

However, the record is conclusive on this point. It

shows that the "decree was entered at the July term of said court, A. D. 1879, on the 28th day of the last-named month, and that said decree has been executed, and your petitioners have obeyed the same. That one of the masters in chancery of this court sold said real estate, as will hereinafter more fully appear, and that the complainant at said master's sale became the purchaser thereof, and that a writ of restitution was afterwards issued out of this court on the 7th day of March, A. D. 1881, and thereupon by virtue of said suit your petitioners were ousted from the possession of said premises, and the said premises delivered to the said complainant, Edgar M. Van Kleeck, and he put in possession of the same by the United States marshal of said district, and is now in possession thereof."

This is admitted by the demurrer, and appellees cannot now be heard to deny it. They cannot "blow hot and cold."

There is but one other matter that we desire to call attention to in this reply. Appellees' counsel says in his *statement* (p. 3) that, "No evidence whatever was introduced upon the hearing of the demurrer. The bill of review itself incorporated and made a part of itself the motion to set aside the sale and the evidence adduced thereon, including Shelton's bankruptcy proceedings; the report of sale by the master, and the order of confirmation thereof, as well as the proceedings, including the evidence, in the original case."

It will be seen that the bill of review only mentioned and referred to these documents as exhibits to be used in evidence on the trial of the cause (Or. Rec. p. 31, Pr. Rec. p. 13). And it is the first time in our experience

that we ever heard of a demurrer being interposed to a mere exhibit mentioned in a chancery bill, and it will certainly be new to the court.

It will also be seen that appellees' counsel not only introduced this certificate of evidence as testimony on the hearing of the demurrer before the district judge, but he also brings up this same certificate into this court as an *additional record*, and introduces it here in the face of his denial that it was introduced in the court below, and also in the face of his theory (very persistently insisted on) that the court in examining a bill of review cannot go behind the decree and look into any of the other proceedings in the case.

Appellees' counsel waxes angry, and berates us for being unmannerly and ill-bred, and for making "an unwarrantable attack on the justly distinguished and upright judge who decided the demurrer in this case." We will not imitate the counsel in his anger, nor in his choleric outbreaks in his brief, but would simply say that a lawyer should never forget that he is a gentleman, and should always confine himself to the truth. We made no attack of any kind on the excellent jurist who decided the demurrer below. We referred to him as being able and discriminating, and we believe him to be a conscientious jurist of integrity and ability, and we would be very sorry to believe that in sustaining the demurrer he had violated either conscience or duty; on the contrary, we believe that he acted in that case (as we believe he does in all others) with a conscientious regard to his duty, as he understood it.

It seems to us that this case appeals strongly to a court of conscience. The bankruptcy and extreme pov-

erty of appellants, induced by stringent times, stagnant business, failure of crops, and depression of prices, made it utterly impossible for appellants to appeal at any stage of the proceedings in the original case; and Shelton's bankruptcy has been wielded, like the club of Hercules, by appellees' counsel, to beat him down at every step in the progress of this litigation, and he brings the same weapon into this court, and uses it here for the same purpose.

In an original indebtedness of about $4,000 honestly due, these defendants, through the peculiar machinations of unconscientious usurers, have been driven from their farm, lost their home, have been ousted by the operation of a decree of a court of chancery, from which they were unable to appeal in the ordinary way, and shall they now have the last avenue to justice closed against them? We hope not! and confidently expect that the decree of the court below will be in all things reversed.

LEWIS E. PAYSON,
CHARLES J. BEATTIE,
Counsel for Appellants.